TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 77.

LYDA B. CONLEY, APPELLANT,

vs.

JAMES R. GARFIELD, SECRETARY OF THE INTERIOR, AND HORACE B. DURANT, THOMAS G. WALKER, AND WILLIAM A. SIMPSON, COMMISSIONERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED FEBRUARY 17, 1908.

(21,023.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1909.

1 The United States of America to James R. Garfield, Secretary of the Interior, Horace B. Durant, Thomas G. Walker and William A. Simpson, Commissioners, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein Lyda B. Conley is appellant plaintiff in error, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock Judge of the Circuit Court of the United States for the District of Kansas, this 30" day of December in the year of our Lord one thousand nine hundred and seven.

JOHN C. POLLOCK,
United States District Judge
for the District of Kansas.

Service accepted this 30" day Dec. 1907.

H. J. BONE,
U. S. Att'y.

2 [Endorsed:] No. 8548. United States Circuit Court, First Division of the Judicial District of Kansas. Lyda B. Conley, vs. James R. Garfield, Secretary of the Interior et al. Citation. Filed 30" day of Dec. 190–. Geo. F. Sharitt, Clerk.

3 The Circuit Court of the United States in and for the District of Kansas.

In Equity. No. 8548.

LYDA B. CONLEY, Plaintiff,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Defendants.

Petition for Injunction.

To the Judges of the Circuit Court of the United States for the District of Kansas:

Lyda B. Conley of Kansas City, Kansas, and a citizen of the State of Kansas, brings this bill against James R. Garfield, Secretary of the Interior of the United States of America, and Horace B. Durant

of Wyandotte Indian Territory, and a citizen and subject of a foreign state, and Thomas G. Walker, of Wyandotte, Indian Territory, and a citizen and subject of a foreign state, and William A. Simpson, of Kansas City, Kansas, and a citizen of the State of Kansas, Commissioners.

1. And thereupon your orator complains and says that she is a citizen, Wyandotte Indian, and nas seizin and a legal estate in and to the Public Burial ground described as follows, to-wit:

Commencing 28 poles south of the N. E. Cor. of the N. W. ¼ of the N. W. ¼ of Sec. 10, T. 11 S. R. 25 E., thence south 16° 1′ west 31 poles and 15 links, thence East 11 poles and 8 links, thence North 15° 30′ East 27 poles and 22½ links, thence North 71 West 10 poles and 18 links to the beginning containing 2 acres, and known as the Huron Cemetery, located in the City of Kansas, County of Wyandotte, and State of Kansas.

2. That the aforesaid burial-ground, under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, in the year A. D. one thousand eight hundred and fifty-five and before the said Wyandotte Indians had agreed, and stipulated that their organization and their relations with the United States as an Indian tribe should be dissolved and terminated,
4 was permanently reserved and appropriated for that purpose. (Articles I and II of said treaty.)

3. That under a treaty made and concluded with the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskias, Weas and Piankeshaws, Ottowas of Blanchards's Fork and Roche de Boeuf, and certain Wyandottes, the twenty-third day of February, in the year A. D. one thousand eight hundred and sixty-seven, only a portion of the said Wyandotte Indians, were enabled to begin *anew* a tribal existence. (Preamble of said treaty.)

4. That the aforesaid Burial ground contains the remains of your orator's ancestors and parents, Andrew S. Conley, and Eliza B. Conley, who was a Wyandotte Indian, and a sister Sarah M. Conley who was a Wyandotte Indian, interred therein, as may be shown by certain marks, and has been held and used for a burial ground for many years.

5. And your orator further shows unto your Honors that the said defendants claim authority under an unconstitutional and inconsistent Act of Congress, Approved June 21, 1906, providing "That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five" said Act of Congress is in contravention to Article VI of the Constitution of the United States of America, which declares that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land", and impairs the obligation of a contract which is contrary to the Constitution of the United States; and furthermore the said Act is illegal and void by reason of impossibility to perform condi-

tions "to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro Kansas" meaning the burying ground which under the said treaty of January 31, 1855 was reserved, granted and conveyed to the Methodist Episcopal Church (10 Stats. 1160) All rights of the Wyandotte Indians and of the United States, and title in and to said Quindaro Burying-Ground, passed to that church when the said treaty was ratified and proclaimed. And furthermore the said Quindaro burying-ground is held in adverse possession by the Quindaro Cemetery Association, as is shown by the District court records in and for Wyandotte county, State of Kansas, in an injunction proceeding of February 3, 1906, entitled "V. J. Lane vs. The Quindaro Cemetery Association, et al", adjudicated July 20, 1906.

6. That the said defendants have signified their intentions and threaten the wrongful removal of the remains of the said persons interred in the said Burial-ground, and have declared their intentions and threaten to provide for the illegal sale of said Burial-ground, and in furtherance of the said threatened acts of violence the said James R. Garfield, Secretary of the Interior of the United States, has appointed as Commissioners, the said Horace B. Durant, Thomas G. Walker, and William A. Simpson, and the said Commissioners have established headquarters in Room 13, Federal Building, Kansas City, Kansas, for the purpose of carrying out and performing said wrongful and illegal acts, thereby inflicting great and irreparable damage upon your orator, all of which threatened acts or doings are contrary to Equity and good conscience.

7. And for as much as your orator can have no adequate relief except in this court, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable court, perpetually enjoining and restraining the said defendants, forever, from encroaching upon or disturbing the remains of said persons interred in said Burial-ground or the grave stones, or any other acts of desecration, or violence, and perpetually enjoining and restraining the said defendants, forever, from advertising for sale by bid or otherwise or accepting bids for the sale of said Burial-ground, in violation of your orator's rights as aforesaid.

8. And your orator further prays that a provisional or preliminary injunction be issued, enjoining and restraining the said defendants from any further wrongful acts pending this cause, and for such further relief as the equity of the case may require, and to your Honors may seem meet.

9. And may it please your Honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said James R. Garfield, Secretary of the Interior, and the said Horace B. Durant, and Thomas G. Walker, and William A. Simpson Commissioners, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the

premises as to the court shall seem proper and required by the principles of equity and good conscience.

LYDA B. CONLEY,
Plaintiff.

UNITED STATES OF AMERICA,
State of Kansas, County of Wyandotte, ss:

On this 10 day of June, 1907, before me personally appeared Lyda B. Conley, the complainant above named, who being by me duly sworn, deposes and says that she has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of her own knowledge.

Sworn and subscribed before me this 10 day of June, 1907.

[SEAL.] F. M. HOLCOMB,
County Clerk.

Endorsed: #8548. The Circuit Court of the United States, in and for the District of Kansas. Lyda B. Conley, Plaintiff vs. James R. Garfield, Secretary of the Interior, et al., Defendants. Petition for Injunction In Equity. No. —. Filed June 11, 1907 Geo. F. Sharitt, clerk Lyda B. Conley, atty-at-law 1712 North 3rd street, Kansas City, Kansas.

7 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to James R. Garfield, Secretary of the Interior, Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, First Division, at the City of Topeka, in said District, on the first Monday in the month of August, next, to answer the Bill of Complaint of Lyda B. Conley this day filed in the Clerk's office of said Court in said City of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Leavenworth, in said District, this 11" day of June in the year of our Lord one thousand nine hundred and seven.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Memorandum.

The above named defendants are notified that unless they enter their appearance in the Clerk's office of said Court, at the City of

Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk.*

8 [Endorsed:] No. 8548. Circuit Court United States, District of Kansas. Lyda B. Conley vs. James R. Garfield, Sec'ty &c., et al. Chancery Subpœna. Returnable to rule day, first Monday in August, A. D. 1907. Geo. F. Sharitt, Clerk. Filed June 21, A. D. 1907. Geo. F. Sharitt, Clerk. Lyda B. Conley, Compt's Sol.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ June the 12, 1907, and executed the same as follows, to wit: Served on the within named Horace B. Durant, Thomas G. Walker, and William A. Simpson, commissioners, each personally by delivering a true and certified copy of this writ with all endorsements thereon at Kansas City, Kansas, on the 17th day of June, 1907. The within named James R. Garfield, Secretary of the Interior, not served; not found in my district.

WILLIAM H. MACKEY, JR.,
U. S. Marshal.

Fees $7.38/100.

9 In the Circuit Court of the United States in and for the District of Kansas.

In Equity. No. 8548.

LYDA B. CONLEY, Complainant,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Defendants.

Demurrer of Defendants to Complainant's Bill.

The defendants above named jointly and severally by protestation, not confessing or acknowledging all or any of the matters and things in said bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer shows:

I.

That it appears on the face of said bill that this court is without jurisdiction of the parties hereto, or of the subject matter hereof, the complainant and the defendant William A. Simpson both being citizens of the State and District of Kansas, and the defendants Horace B. Durant and Thomas G. Walker, not being shown to be

citizens of any other state or country, and if citizens of the Indian Territory are not subject to the jurisdiction of this court, and the defendant James R. Garfield not being shown or alleged to be a resident of any state or territory or country whatsoever.

II.

Said bill fails to allege or show any value or amount of property involved in this controversy, and does not allege or show that the sum of Two Thousand dollars, or any other sum or value is involved herein.

III.

Said bill fails to allege or show any title of complainant to the property described, the allegation that she has seizin and the legal estate therein being a mere conclusion, and said bill utterly fails to show the nature of such pretended seizin or estate.

IV.

The treaty mentioned in said bill, concluded in 1855, was with the Wyandotte Nation and complainant, as shown by her bill, is not a member of said Nation or tribe of Wyandotte Indians, but is a citizen of the State of Kansas, and therefore has no right, title or interest in or to the property involved, as a member of said Wyandotte Nation or tribe with whom said treaty was concludde.

V.

Said bill utterly fails to show by what authority complainant's relatives and ancestors were interred in the burial ground mentioned in said bill, or that the Government of the United States, which holds the legal title to said ground by virtue of said treaty of 1855, ever consented to or acquiesced in said interment.

VI.

Article Six of the Constitution of the United States, mentioned in said bill, does not provide, as therein alleged, that treaties shall be the supreme law of the land, but that the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under authority of the United States shall be the supreme law of the land.

VII.

Said bill shows upon its face that the Act of Congress of June 21, 1906, is of equal authority with any treaty theretofore concluded between the United States and any tribe of Indians.

VIII.

Said bill utterly fails to show how said Act of Congress impairs the obligation of any contract and utterly fails to allege or show any contract whatever between the United States and complainant.

IX.

The allegation of said bill, to the effect that said Act of Congress is impossible of performance by reason of the Cemetery at Quindaro, Kansas, being held in adverse possession is a mere conclusion
11 of the pleader and states no facts on which any supposed rights of complainant can be based.

X.

That it appears by complainant's own showing by said bill that she is not entitled to the relief prayed for therein against these defendants, nor either of them.

10½.

That this is really a suit against the United States without its consent.

XI.

That it appears from the face of said bill and the Act of Congress of June 21, 1906, therein referred to, said Congress enacted said statute in relation to property to which the Government of the United States held the legal title in pursuance of its legislative power granted by the constitution of the United States, which constitution does not prohibit said congress from impairing the obligation of a contract, and presumptively for good and sufficient reasons, and because the location of said cemetery and the circumstances surrounding the same require that it be no longer used as a burial ground, and that the remains therein interred be removed to another location.

Wherefore and for divers other good causes of demurrer appearing on the said bill, these defendants demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

H. J. BONE,
United States Attorney,
J. S. WEST,
Assistant United States Attorney,
Solicitors for Defendants.

STATE OF KANSAS,
County of Shawnee, ss:

William A. Simpson, makes solemn oath and says that he is one of the above named defendants, and that the foregoing demurrer
12 is not interposed for delay.

——— ———.

Subscribed and sworn to before me this — day of June, 1907.

——— ———.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. S. WEST,
Of Counsel for Defendants.

Endorsed: 8548. In the Circuit Court of the United States in and for the District of Kansas. Lyda B. Conley, complainant, vs. James R. Garfield, Sec'y of the Interior, et al. In Equity. No. 8548. Demurrer of Defendants to Complainant's Bill. Filed July 1, 1907. Geo. F. Sharitt, clerk.

13 In the Circuit Court of the United States for the District of Kansas.

8548.

LYDA B. CONLEY, Complainant,
v.
JAMES R. GARFIELD, Secretary of the Interior, et al., Defendants.

Order.

Now on this first day of July, 1907, this cause comes on to be heard upon the demurrer of the defendants to the bill of complaint, complainant appearing in person, and by herself as solicitor, and the defendants appearing by J. S. West, one of their solicitors, and the demurrer having been argued.

It is ordered that the bill of complaint and the demurrer thereto be referred to Chas. Blood Smith Esq., to determine and report whether said bill is susceptible of amendment so as to come within the jurisdiction of this court, the defendants contending that this court is without jurisdiction, for the reason that this is an attempt to sue the United States without its consent.

JOHN C. POLLOCK, *Judge.*

Endorsed: 8548. Conley vs. Garfield, et al. Order. Filed July 1, 1907. Geo. F. Sharitt, clerk.

14 In the Circuit Court of the United States for the District of Kansas.

LYDA B. CONLEY, Plaintiff,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker and William A. Simpson, Commissioners, Defendants.

Report of Special Master.

The Hon. John C. Pollock, Judge of said Court:

The issues joined by the Bill of Complaint and the demurrer filed by the defendants having been referred to me to report upon the questions raised by said demurrer I beg to state:

That the complainant appeared before me on this 1st day of July in person and the defendants appeared by J. S. West, their solicitor,

and the questions raised by the demurrer were duly argued. I find upon an examination of the bill of complaint that several of the grounds of demurrer suggested by the defendants could be cured by a proper amendment to the bill. But in my opinion certain grounds suggested by the demurrer raising the question of jurisdiction cannot be cured by amendment. It appears from the bill that the complainant is a citizen of the state of Kansas, and is a citizen Wyandotte Indian, which tribe prior to the year 1855 were the owners of a large tract of land located in the county of Wyandotte, state of Kansas, at the mouth of the Kansas river. That by the treaty made in 1855 between the Government and the Wyandotte Nation, said nation ceded and relinquished to the United States all their right, title and interest to the lands located at the forks of the Missouri and Kansas rivers, which had been previously purchased by said tribe from the Delaware Indians, excepting the following described lands, viz:

15 The portion now inclosed and used as a public burial ground shall be permanently reserved and appropriated for that purpose; two Acres to include the Church Building of the Methodist Episcopal Church and the present burying-ground connected therewith are hereby reserved, granted and conveyed to that church, and two acres to include the Church building of the Methodist Episcopal Church, South, are hereby reserved granted and conveyed to said church: Four acres at and adjoining the Wyandotte Ferry across and near the mouth of the Kansas river shall also be reserved and together with the rights of the Wyandottes in said Ferry, shall be sold to the highest bidder among the Wyandotte people, and the proceeds of the sale paid over to the Wyandottes on the payment of the purchase money in full, a good and sufficient title to be secured and conveyed to the purchaser by patent from the United States. See article 2 of Wyandotte Treaty of 1855.

Under this provision the mother and relatives of the complainant who were members of the Wyandotte Tribe of Indians, were interred in said cemetery, together with other members of the tribe, and said ground up to the present time has been reserved and used as a cemetery for the members of said tribe.

In the year 1905, Congress under its power to legislate for the Indians passed an Act, which among other things provided as follows: That the Secretary of the Interior is hereby authorized to sell and convey under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for public burying ground, under a treaty made and concluded with the Wyandotte tribe of Indians, on the 31st day of January, 1855, and authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground, and their re-interment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains re-interred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people or their legal heirs, all claims

for losses sustained by reason of the purchase of the alleged
16 rights of the Wyandotte tribe in a certain ferry named in said treaty. If, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statute of limitations, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte Tribe of Indians who were parties to said treaty, their heirs or legal representatives.

It is alleged in the bill of complaint, that under the provisions of the Act of Congress, above referred to, James R. Garfield, the Secretary of the Interior, appointed the other defendants Commissioners to carry out the provisions of said act. The bill of complaint is brought by the complainant for herself individually, upon the ground that she has a vested interest in said burial ground by virtue of her ancestors being interred therein that cannot be interfered with by the Commissioners acting under the provisions of said Act of Congress, and that the Secretary of the Interior is without power to carry out such provisions. Disregarding all except two of the grounds of demurrer suggested by the defendants to the Bill of Complaint, in my opinion there remains two grounds upon which the plaintiff cannot obtain the relief sought in her bill. That is to say, that in my view this court is without jurisdiction to entertain the bill, for the reason that in effect it is a suit against the United States, brought in this court and without its consent to be sued. My attention has been directed in support of such contention to the case of Na-ga-nab vs. Hitchcock, 202 U. S. 473, wherein it was held by the Supreme Court of the United States, that a suit brought by a Chippewa Indian on his own behalf, as well as on behalf of other members of his tribe, against the Secretary of the Interior to enjoin him from carrying out the provisions of a certain act of Congress, was in effect a suit against the United States and in the absence of any waiver on the part of the Government of immunity from said cause, the courts have no jurisdiction of such a suit.

It appears from the bill of complaint in the case at bar, that the Secretary of the Interior and the members of the Commission have no personal interest in the controversy whatever, that they are simply carrying out the power delegated to them by the Act of Congress above referred to.

17 Quoting from the opinion of the case last above referred to, the court says:

"It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States, under the Act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of the opinion that there is no

jurisdiction to entertain this case. In respect to this question it is on all fours with State of Oregon vs. Hitchcock et al., decided on April 23 of this term."

To the same effect in my view is the case of the State of Minnesota vs. Hitchcock, 185 U. S. 382. That was a suit instituted by the State of Minnesota against Mr. Hitchcock as Secretary of the Interior in the Supreme Court of the United States, and the jurisdiction of that court was sustained solely on the ground that it was a suit between the State of Minnesota and the United States. That Mr. Hitchcock, as Secretary of the Interior, had no personal interest in the suit, but was the representative of the Government. And that by the provisions of the Indian School Act, Congress had consented that the Government could be sued.

In my opinion this court is without jurisdiction to entertain the bill of complaint upon the ground that full legislative power was invested in Congress to provide for the disposal, and sale of burial ground, and the removal of the remains of such Indians that had been interred therein, and that such legislation is binding upon all courts.

The Supreme Court of the United States, in the case of Lone-Wolf vs. Hitchcock, 187 U. S. 565, in passing upon this legislative power of Congress to control the affairs of Indians says:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power
18 has always been deemed a political one not subject to be controlled by the judicial department of the Government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties and of course a moral obligation rested upon Congress to act in good faith, in performing the stipulations entered into on its behalf. But as with treaties made with foreign nations, Chinese exclusion case, 130 U. S. 581-600, the Legislative power might pass laws in conflict with treaties made with the Indians." Citing Thomas vs. Gray 169 U. S. 270; Ward vs. Race Horse, 163 U. S. 54; Spalding vs. Chandler 160 U. S. 405-394, Railroad Company vs. Roberts 152 U. S. 117 and others.

Continuing the Court says:

"The power exists to abrogate the provisions of an Indian treaty though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand in the interest of the country and the Indians themselves that it should do so. When therefore treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress and that in a contingency such power might be availed of from the consideration of Governmental policy, particularly if consistent with perfect good faith towards the Indians."

In my opinion the Act of Congress providing for the sale of the burial ground in controversy, was the proper exercise of legislative power which cannot be prevented from being carried out by the injunction of this or any other court.

Under the foregoing opinions of the Supreme Court of the United States, I am constrained to recommend that the injunction applied for be denied, and the bill dismissed for want of jurisdiction in this court to afford the relief asked for. All of which is respectfully submitted.

CHAS. BLOOD SMITH,
Special Master.

Endorsed: 8548 Lyda B. Conley vs. James R. Garfield, et al. Opinion of Special Master. Filed July 2, 1907. Geo. F. Sharitt, clerk.

19 In the Circuit Court of the United States in and for the District of Kansas.

In Equity. No. 8548.

LYDA B. CONLEY, Plaintiff,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Defendants.

Amended Bill of Complaint for Injunction.

To the Judges of the Circuit Court of the United States for the District of Kansas:

Lyda B. Conley of Kansas City, Kansas, and a citizen of the State of Kansas, brings this bill against James R. Garfield, Secretary of the Interior of the United States of America, of Washington, D. C., and Mentor, Ohio, and a citizen of the State of Ohio, and Horace B. Durant of Wyandotte, Indian Territory, and a citizen of the Territory of Indian Territory, and Thomas G. Walker, of Wyandotte, Indian Territory, and a citizen of the Territory of Indian Territory, and William A. Simpson, of Kansas City, Kansas, and a citizen of the State of Kansas, Commissioners.

I.

And thereupon your orator complains and says that she is a citizen Wyandotte Indian, being a descendant of the Wyandotte Indians mentioned in the treaty, made and concluded by and between the United States and the Wyandott Nation of Indians on the thirty-first day of January, in the year A. D. one thousand eight hundred and fifty-five, Article one, providing that "The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated
20 that their organization and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date

of such ratification the said Wyandott Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared, to be citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens; and shall in all respects be subject to the laws of the United States and of the Territory of Kansas in the same manner as other citizens of said Territory; and the jurisdiction of the United States and the said Territory shall be extended over the Wyandott country in the same manner as over other parts of said Territory. But such of the said Indians as may so desire, and make application accordingly to the commissioners hereinafter provided for, shall be exempt from the immediate operation of the preceding provisions extending citizenship to the Wyandott Indians, and shall have continued to them the assistance and protection of the United States and an Indian agent in their vicinity for such a limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian Affairs; and on the expiration of such period or periods the said exemption, protection, and assistance shall cease; and said persons shall then, also, become citizens of the United States, with all the rights and privileges, subject to the obligations above stated and defined"; and that she has seizin, and a legal estate, and vested rights in and to the public-burial ground described as follows: to-wit: Commencing 28 poles South of the N. E. Cor. of the N. W. ¼ of the N. W. ¼ of Sec. 10 T. 11 S. R. 25 E., thence south 16° 1′ West 31 poles and 15 links, thence east 11 poles and 8 links, thence North 15° 30′ East 27 poles and 22½ links, thence North 71 West 10 poles and 18 links to the beginning, containing 2 acres, and known as the Huron Place Cemetery, located in the City of Kansas, County of Wyandotte, and State of Kansas, the said Burial-ground has become — depository of the dead, consecrated to their use by a permanent reservation and Appropriation, and that although the value of the land itself is the sum of seventy-
five thousand dollars ($75000.00) or more, that by reason
21 of the aggrieved and wounded feelings of said orator there can be no standard by which to estimate the value of said seizin, legal estate, and vested rights as heir and beneficiary as is further shown.

II.

That the aforesaid Burial-ground, before said Wyandott Indians had agreed, and stipulated that their organization and their relations with the United States as an Indian tribe should be dissolved and terminated, was *permanently* reserved and *Appropriated* for that purpose, under said treaty made and concluded by and between the United States and the Wyandott Indians on the thirty-first day of January, in the year A. D. one thousand eight hundred and fifty-five, Article 2, providing, "The Wyandotte Nation hereby cede and relinquish to the United States all their right, title and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint

resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty, except as follows, viz: The portion now enclosed and used as a public burying-ground shall be permanently reserved and appropriated for that purpose; two acres, to include the church-building of the Methodist Episcopal church, and the present burying ground connected therewith, are hereby reserved, granted and conveyed to that church; and two acres, to include the church-building of the Methodist Episcopal Church, south, are hereby reserved, granted and conveyed to said church. Four acres, at and adjoining the Wyandott ferry, across and near the mouth of the Kansas River, shall also be reserved, and together with the rights of the Wyandotts in said ferry shall be sold to the highest bidder among the Wyandott people, and the proceeds of sale paid over to the Wyandotts. On the payment of the purchase money in full, a good and sufficient title to be secured and conveyed to the purchaser by patent from the
22 United States." That the said Burial-ground permanently reserved and appropriated to Charitable Uses by said Wyandott Nation, was accepted on the part of said orator as beneficiary of said Appropriation, and said orator still evidences said acceptance, and use.

III.

That under a treaty made and concluded by and between the United States and certain chiefs, delegates and head-men of the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskiskias, Weas, and Piankeshaws, Miamis, Ottowas of Blanchard's Fork and Roche de Boeuf, and certain Wyandottes, on the part of said Indians, on the twenty-third day of February, in the year A. D. one thousand eight hundred and sixty-seven in the words and figures following, to-wit: "Articles of agreement, concluded at Washington D. C. the twenty-third day of February one thousand eight hundred and sixty-seven, between the United States, represented by Lewis V. Bogy, Commissioner of Indian Affairs, W. H. Watson, Special commissioner, Thomas Murphy, superintendent of Indian Affairs, George C. Snow, and G. A. Colton, U. S. Indian Agents, duly authorized, and the Senecas, represented by George Spicer and John Mush; the Mixed Senecas and Shawnees, by John Whitetree, John Young, and Lewis Davis; the Quapaws, by S. G. Vallier and Ka-zhe-cah; the Confederated peorias, Kaskaskias, Weas and Piankeshaws, by Baptiste Peoria, John Mitchell, and Edward Black; the Miamies, by Thomas Metosenyah and Thomas Richardville; and the Ottawas of Blanchard's Fork and Roche de Boeuf, by John White and J. T. Jones, and Including *certain Wyandott*(e)s represented by Tauromee, or John Hat, and John Karaho.

Whereas it is desirable that arrangements should be made by which portions of certain tribes, parties hereto, now residing in Kansas should be enabled to remove to other lands in the Indian

Country south of that State, while other portions of said tribes desire to dissolve their tribal relations and become citizens; and

Whereas it is necessary to provide certain tribes, parties hereto, now residing in the Indian country, with means of rebuilding their houses, re-opening their farms, and supporting their families, they having been driven from their reservations early in the late war, and suffered greatly for several years, and being willing to sell a
23 portion of their lands to procure such relief; and

Whereas a *portion* of the Wyandottes, parties to the treaty of one thousand eight hundred and fifty-five, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and

Whereas the Wyandottes, treated with in eighteen hundred and fifty-five, have just claims against the Government, which will enable the *portion* of *their people* herein referred to to begin *anew* a tribal existence". Only a portion of the said Wyandottes were enabled to begin *anew* a tribal existence.

IV.

That said orator's ancestors and mother were members of the Wyandott Nation of Indians, mentioned in Article 1, of the said treaty of January 31, 1855; and that under the authority of said permanent reservation, appropriation, and dedication of the aforesaid Public burying ground on the part of the said Wyandott Nation of Indians, and the acceptance and use of same on the part of said orator as beneficiary, as before mentioned, said Burial-ground contains the remains of your orator's ancestors, and parents, Andrew S. Conley, and Eliza B. Conley who was a Wyandott Indian as above stated, and a sister of Sarah M. Conley, who was a Wyandotte Indian, interred therein as may be shown by certain marks, and has been held and used for a Burial-ground for many years.

V.

And your orator further shows unto your Honors that the said defendants claim authority under an unconstitutional, and inconsistent Act of Congress, approved June 21, 1906, Section 88, providing "That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and
24 their reinterment in the Wyandotte Cemetery at Quindaro, Kansas and to purchase and put in place appropriate monuments over the remains re-interred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the pay-

ment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte tribe in a certain ferry named in said treaty, if, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid per capita to the members of the Wyandotte tribe of Indians who were parties to said treaty, their heirs, or legal representatives." That the said burial ground, under said treaty of January 31, 1855 was *permanently* reserved and *appropriated* to a public use, and has not been, and is not, abandoned, and has been accepted and used by the public continuously, since the time of the dedication on the part of the Wyandott Nation, without dispute or molestation on the part of said Donors, or any person or persons whatsoever. That the said act of Congress is contrary to the Constitution of the United States, Article V, of the Amendments to the Constitution which declares "No person * * * to be deprived of life, liberty or property, without due process of law", and Article VI, which declares that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." That the said act of Congress is in violation of said Orator's sacred and invoilable constitutional rights, and is inconsistent with the Act of Congress of March 3, 1871, embodied in paragraph 2079 of the Revised Statutes, "No Indian Nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired," and impairs the obligation of Article 2, of said treaty of January 31, 1855, viz: "The portion now enclosed and used as a public burying ground shall be permanently reserved and appropriated for that purpose."

And furthermore, the said Act of June 21, 1906, as passed by Congress is illegal and void by reason that it assumes control of the "Wyandotte Cemetery at Quindaro, Kansas," meaning the burying-ground which under the said treaty of January 31, 1855, was reserved, granted and conveyed to the Methodist Episcopal Church, (10 Stats. 1160) and without any provisions for the purchase of same. And, furthermore, that the said Quindaro Cemetery is held in open and notorious possession by the Quindaro Cemetery Association, which possession is without title as is shown by the District court records, in and for Wyandotte county, state of Kansas, in an injunction proceeding of February 3, 1906, entitled "V. J. Lane, vs. The Quindaro Cemetery Association et al", adjudicated July 20, 1906.

VI.

That the said defendants have signified their intentions and threaten the wrongful removal of the remains of the said persons interred in the said Burial-ground, and have declared their intentions and threaten to provide for the illegal sale of said Burial

ground, and in furtherance of the said threatened acts of violence the said James R. Garfield, Secretary of the Interior of the United States of America, has appointed as Commissioners, the said Horace B. Durant, Thomas G. Walker, and William A. Simpson, and the said Commissioners have established head-quarters in Room 13, Federal Building, Kansas City, Kansas, for the purpose of carrying out and performing said wrongful and illegal acts, thereby inflicting great and irreparable damage upon your orator, all of which threatened acts or doings are contrary to Equity and good conscience.

VII.

And forasmuch as your orator can have no adequate relief except in this court, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable court, perpetually enjoining and restraining the said defendants, forever, from encroaching upon or disturbing the remains of said persons interred in said burial-ground, or the grave stones, or any other act or acts of desecration or violence, and perpetually enjoining and restraining the said defendants, forever, from advertising for
26 sale by bid, or otherwise, or accepting bids for the sale of said Burial-ground, in violation of your orator's rights as aforesaid.

VIII.

And your orator further prays that a provisional or preliminary injunction be issued, enjoining and restraining the said defendants from any further wrongful acts pending this cause, and for such further relief as the equity of the case may require, and to your Honors may seem meet.

IX.

And may it please your honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said James R. Garfield, Secretary of the Interior, and the said Horace B. Durant, and Thomas G. Walker, and William A. Simpson, Commissioners, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

LYDA B. CONLEY,
Plaintiff.

UNITED STATES OF AMERICA,
State of Kansas, County of Wyandotte, ss:

On this 19th day of July, 1907, before me personally appeared Lyda B. Conley, the complainant above named, who being by me, duly sworn, deposes and says that she has read the foregoing amended bill of complaint and knows the contents thereof, and that the same is true of her own knowledge.

LYDA B. CONLEY.

Sworn and subscribed before me, this 19th day of July, 1907.
[SEAL.] H. W. COX,
Notary Public.

Com. expires March 29", 1911.

27 Endorsed: #8548. The Circuit Court of the United States, in and for the District of Kansas. Lyda B. Conley, Plaintiff, vs. James R. Garfield, Secretary of the Interior et al., Defendants. Amended bill of Complaint, for Injunction. In Equity. No. 8548. Filed July 2, 1907. Geo. F. Sharitt, clerk. Lyda B. Conley, att'y-at-law, 1712 North 3rd Street Kansas City, Kansas.

28 The Circuit Court of the United States in and for the District of Kansas.

In Equity. No. 8548.

LYDA B. CONLEY, Plaintiff,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, THOMAS G. WALKER, and WILLIAM A. SIMPSON, Defendants.

Bill of Exceptions to Special Master's Report.

The Hon. John C. Pollock, Judge of said Court:

Exceptions taken by the complainant to the report made herein by Charles Blood Smith, Esq., the Master pro hac vice, to whom this cause was referred by an order of this court on the first day of July, A. D. 1907, and by the decree made herein on the second day of July A. D. 1907, which report bears date the first day of July A. D. 1907:

First exception. For that the Special Master in his report says: "In the year 1906, Congress under its *power* to *legislate* for the *Indians* passed an Act;" said complainant excepts, whereas said complainant is not a member of any tribe of Indians, nor a ward of the Government, and therefore not under the legislative power or control of Congress without her consent, and that the land in question is the sepulchres of the dead, permanently reserved and appropriated for that purpose to a charitable use, dedicated on the part of the Wyandotte Nation of Indians, as a whole before said Nation dissolved their tribal relations with the United States and with evidence of acceptance and use by the public, Barclay v. Howell, 6 Pet. 198; and the said public use is not abandoned, Board of Commissioners v. Young, 59 Fed. R. 96, 97. It has not been granted to Congress the *power* to deprive a citizen of life, liberty, or property without due process of law, on the other hand, the exercise of such power is prohibited by Article V. of the Amendments to the Constitution of the United States of America.

29 Second exception. For that the Special Master in his report says: "The bill of complaint is brought by the complainant for herself individually upon the ground that she has a vested

interest in said burial ground by virtue of her ancestors being interred therein;" said complainant excepts whereas said complainant's vested rights and interest therein, in addition to said fact, are based upon Article 2, of the said Wyandotte treaty of January 31, 1855, and as the beneficiary of said appropriation to public use, said burial ground cannot be interfered with by Congress. Davenport v. Buffington et al., 97 Fed. R. 234; Bell v. Railroad Co., 63 Fed. R. 417, 419; 11 C. C. A., 271, 272 and 27 U. S. App. 305, 308; Beatty v. Kurtz, 2 Pet. 565, 583; City of Jacksonville v. Jacksonville Ry. Co., 67 Ill. 540, 542; Le Clerq v. Trustees of Gallipolis, 7 Ohio, 218, 221; pt. 1; Village of Princeville v. Auten, 77 Ill. 325, 330; Brown v. Manning 6, Ohio 298.

Third exception. For that the Special Master in his report says: "That this court is without jurisdiction to entertain the bill, for the reason that in effect it is a suit against the United States, brought in this court and without its consent to be sued," and in support of such contention cites the case of Naganab v. Hitchcock 202 U. S. 473, which is a suit brought by a Chippewa Indian on behalf of himself and other members of his *tribe* in regard to sale and distribution of *tribal property*, and the case of Oregon v. Hitchcock et al., 202 U. S. 60, it is shown (page 61) that "on February 14, 1857, as well as on March 12, 1860, the United States owned in fee simple a large region and body of land lying within the boundaries of the State of Oregon, which said body of land was neither reserved nor dedicated to any public use and was free from any claim, title or possession, saving and excepting a right to temporary use and occupation belonging to certain Indian tribes, and other authorities cited 187 U. S. 294, it was held that "Full administrative power was possessed by Congress over *Indian tribal* property," and "that Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the *tribal lands* were concerned, to be controlled by direct legislation of Congress. Said complainant excepts, and holds that the above-mentioned cases are inapplicable to said complainant's cause of action, and in support thereof, cites the case of United States v. Lee, 106 U. S. 196, wherein it was held by the Supreme Court of the United States, that the doctrine
30 that except where Congress has provided, the United States cannot be sued, has no application to officers and agents of the United States, who when as such holding for public uses possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject matter of inquiry and adjudged accordingly. The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, nor private property taken for public use without just compensation relate to those rights whose protection is peculiarly within the province of the judicial branch of the Government. Cases examined which show that the courts extend protection when the rights of property are unlawfully invaded by public officers." And on page 208 the court says: "It is not to be expected,

therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents. Under our system the *people*, who are there called subjects, are the Sovereign, their rights whether collective or individual are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the Courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

And further in the same case (page 218) the court says: "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizens, when brought in collision with the acts of the Government must be determined. In such cases there is no safety for the citizen, except in the protection of the
31 judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for as Mr. Chief Justice Marshall says: to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question * * * the defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power, not only no such power is given, but is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizens stand in the Constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that constitution." The Siren, 7 Wall. 152; The Davis, 10 Wall. 15.

And in respect to this question is the case of Tindal vs. Wesley, 167 U. S. 204, wherein the Supreme court of the United States decided:

"This was a suit by citizens of New York against citizens of South Carolina to recover possession of certain real property in that State with damages for withholding possession. One of the defendants in his answer stated that he had no personal interest in the property, but as Secretary of the State of South Carolina, had custody of it, and

was in possession only in that capacity. The other defendant stated that he was watching, guarding and taking care of the property under employment by his co-defendant. Both defendants disclaimed any personal interest in the property, and averred that the title and right of possession was in the State. *Held*, That the suit was not one against the State within the meaning of the Eleventh Amendment of the Constitution of the United States declaring that 'the judicial power of the United States shall not be construed to extend
32 to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state.' Whether a particular suit is one against the State within the meaning of the Constitution depends upon the same principles that determine whether a particular suit is one against the United States.

United States vs. Lee, 106 U. S. 196, and other cases, examined and held to decide that a suit against individuals to recover the possession of real property is not a suit against the State simply because the defendant holding possession happens to be an officer of the State and *asserts* that he is lawfully in possession on its behalf. The Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law; and when such officers or agents assert that they are in rightful possession, they must make that assertion good, upon its appearing, in a suit against them as individuals, that the legal title and right of possession is in the plaintiff."

And quoting from the opinion of the above case (page 222) the Court says:

"If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen be not against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." Gilbert vs. McNulta, 96 Fed. R. 84; Meigs vs. McClung's Lessee, 9 Cranch 11.

That the question is well settled that officers of the United States, and States, are not granted immunities from suits in all cases, is further shown in the case of

Board of Liquidation et al. vs. McComb, 92 U. S. 531, decided in the Supreme court of the United States, "the decree appealed from in this case was for a perpetual injunction to restrain the Board of Liquidation of the State of Louisiana from using the bonds
33 known as the con*con*solidated bonds for the State."

Mr. Justice Bradley delivered the opinion of the court, and on page 541, says:

"But it has been well settled, that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which ade-

quate compensation cannot be had at law, may have an injunction to prevent it." Davis vs. Gray, 16 Wall. 203, 220; Regan vs. Farmers Loan & Trust Co., 154 U. S. 389; Tomlinson vs. Branch, 15 Wall. 460; Litchfield vs. Webster County, 101 U. S. 773; Allen vs. Baltimore & Ohio Railroad Co., 114 U. S. 311; Poindexter vs. Greenow, 114 U. S. 270.

Fourth exception. For that the Special Master in his report says: "In his opinion this court is without jurisdiction to entertain the bill of complaint upon the ground that full legislative power was invested in Congress to provide for the disposal, and sale of burial ground, and the removal of the remains of such Indians that had been interred therein, and that such legislation is binding upon all courts."

Said complainant excepts; that whereas, Justice Cooley (Cooley's Blackstone, Vol. I, Page 49, n,) says:

According to the fundamental principles of both the Federal and State Constitutions, the government, the Supreme power or jura summi imperii, resides in the people, and it follows that it is the right of the people to make laws. But as the exercise of that right by the people at large would be equally inconvenient and impracticable, the Constitution reposes the exercise of that power in a body of representatives of the people, but at the same time imposes upon them such restrictions as are deemed important for the general welfare or for the protection of individual rights. Whenever this body of representatives exceed the limits prescribed to their action by the fundamental law from which their whole authority is derived, or whenever they exercise their powers in a manner which the people,

by the Constitution, have not thought proper to allow, their
34 action is not only censurable, but in point of law is *void*, and must not only be so declared by the courts where the point arises in litigation, but may be disregarded and disobeyed by any citizen." See Tucker's Blackstone, Appendix A; Cooley's Const. Limitations, ce. I and VII; Broom's Const. Law, 235; Plowden 236, 187; Lindsay vs. Commissioners, 2 Bay 61.

And further from the authority of Cooley's Const. Limitations (6th Ed.) page 109, the Author says:

"The Legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the courts; for to do so would be the exercise of power which belongs to another branch of the government, and is forbidden to the Legislature". Newland vs. Marsh, 19 Ill. 383; Rice vs. State, 7 Ind. 332; Bloodgood vs. Mohawk & Hudson R. R. Co. 18 Wend. 9; Lindsay vs. Commissioners et al., 2 Bay 38, 61; People vs. Rucker, 5 Col. 455.

Continuing the same author, in Chapter 7, page 197, says:

"The statute is assumed to be valid, until some one complains whose rights it invades. "Prima facie, and upon the face of the act itself nothing will generally appear to show that the act is not valid:

and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained." Wilkinson vs. Leland, 2 Pet 627, 657; Terret vs. Taylor, 9 Cranch 43; Bowman vs. Middleton, 1 Bay 252.

The Supreme court of the United States, in the case of William Marbury vs. James Madison, Secretary of State of the United States, 1 Cranch 137, in passing upon the questions of Constitutional law, and jurisdiction, held, "That an act of Congress repugnant to the Constitution cannot become a law. The courts of the United States are bound to take notice of the Constitution."

And in the case last referred to, (page 161) the court say:

"2. This brings us to the second inquiry; which is: If he
35 has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of Government is to afford that protection."

Continuing the court say: (Page 164.)

"But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is so for the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others." Smyth vs. Ames, 169 U. S. 466, 477, 550; Starr vs. C. R. I. & P. Ry. 110 F. R. 7.

That Congress has *not* the *power* to abrogate or impair existing vested rights and interests created by treaty, is so decided in the case of Chae Chang Ping vs. United States, Chinese Exclusion Case, 130 U. S. 581, wherein the Supreme court of the United States held, that the abrogation of treaty, like the repeal of a law, operates only on future transactions leaving unaffected those executed under it previous to the abrogation.

"The rights and interests created by treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, and not such as are personal and untransferable in their character." Doe et al. vs. Braden, 16 How. 658; Foster vs. Neilson 2 Pet. 253, 314; Garcia vs. Lee, 12 Pet. 511; United States vs. Arrendo, 6 Pet. 691, 748.

Fifth Exception. For that the Special Master in his report says: "In his opinion the Act of Congress providing for the sale of the burial ground in controversy, was the proper exercise of legislative power which cannot be prevented from being carried out by the injunction of this or any court."

Said complainant excepts, and in support of such exception
36 cites the case of Brown et al. vs. Huger, 21 How. 305; "This was an action of ejectment instituted by plaintiff in error against the defendant, the locus in quo being held and occupied by the defendant as an officer of the United States, wherein the Su-

preme Court of the United States held that "Upon the reasoning hereinbefore declared, and upon the authorities cited, to which others might be added, we are of the opinion that the patent from the State of Virginia, of the date of July 29, 1851, was unwarranted and illegal, as having embraced within it lands which were not waste and unappropriated, but which had been previously granted by competent authority, and long in the possession of the patentee and those claiming title under him." Wilcox vs. Jackson, 13 Pet. 498; Meigs et al. vs. McClung's Lessee, 9 Cranch 11.

And to the same effect is the case of Spalding vs. Chandler, 160 U. S. 404, wherein it was held by the Supreme Court of the United States, that "whether the Indians simply continue to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the Government and acquiesced in by the Indians is immaterial. The clear duty rested upon the Government to see that the tract was reserved for the purposes designated in the treaty." United States vs. Carpenter, 111 U. S. 347, 349.

And whereas the said complainant is a citizen of the United States of America, and not a member of any Indian tribe, and

Whereas; The Act of Congress providing for the sale of the Burial ground in controversy was not the proper exercise of legislative power, and for the reason that it violates said complainant's Constitutional rights, which Article V, of the Amendments to the Constitution of the United States, declares that "no person shall be deprived of life, liberty, or property without due process of Law." And quoting from Colley's Constitutional Limitations, (page 290) that "the only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and if the uses are charitable, to secure their
37 regular administration through the means of equitable tribunals, in cases where they would otherwise be a failure of justice."

Wherefore the complainant, under the foregoing opinions of the Supreme Court of the United States, excepts to the said Special Master's report and asks the judgment of the court thereon.

LYDA B. CONLEY,
Complainant.

Endorsed: 8548. Lyda B. Conley vs. James R. Garfield, Sec'y of the Interior et al. Bill of exceptions to Special Master's report. Filed July 2, 1907. Geo. E. Sharitt, clerk.

38 In the Circuit Court of the United States, District of Kansas.

LYDA B. CONLEY, Complainant,

vs.

JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Defendants.

Decree.

On this 2nd day of July, 1907, this cause having come on to be heard upon the report of Charles Blood Smith, Esq., Special Master to whom the bill and demurrer thereto herein were referred to determine and report whether or not said bill is susceptible of amendment so as to bring this cause within the jurisdiction of this court. Said Master having reported on this day that this court has no jurisdiction to afford relief sought herein, it is ordered adjudged and decreed that for want of jurisdiction said bill of complaint herein be and the same is hereby dismissed, with costs to the defendant to be taxed. Complaint desiring to amend her Bill of complaint for the purpose of presenting the question of the jurisdiction of this court to the Supreme Court of the United States, it is further ordered that if complainant present her amended bill of complaint to the clerk of this court within 20 days that the same be filed as of this date and prior to the entrance of an order dismissing this suit if such amended bill be not presented within 20 days from this date the case to stand finally dismissed.

JOHN C. POLLOCK, *Judge.*

July 2nd, 1907.

Endorsed: 8548. Conley vs. Garfield, et al. Order. Filed July 2, 1907. Geo. F. Sharitt, Clerk.

39 The Circuit Court of the United States in and for the District of Kansas.

LYDA B. CONLEY, Plaintiff, Appellant,

vs.

JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Defendants, Respondents.

The above named plaintiff, Lyda B. Conley, conceiving herself aggrieved by the order entered on July 2, 1907, in the above entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States, and prays that this her appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made duly authenticated, may be sent to the Supreme Court of the United States.

LYDA B. CONLEY,

Attorney for Plaintiff and Appellants,
1712 North 3rd Street, Kansas City, Kans.

Topeka, Kansas, —— —, 1907.

And now, to-wit, on Oct. 9th, 1907, it is ordered that the appeal be allowed as prayed for.

JOHN C. POLLOCK,
Circuit Judge.

Endorsed: No. 8548. Order allowing appeal. Filed Oct. 9, 1907. Geo. F. Shariff, Clerk.

40 In the Supreme Court of the United States, October Term, 1907.

LYDA B. CONLEY, Appellant,
vs.
JAMES R. GARFIELD, Secretary of the Interior; HORACE B. DURANT, Thomas G. Walker, and William A. Simpson, Commissioners, Respondents.

Assignment of Errors.

Comes now Lyda B. Conley appellant, and respectfully represents that she feels herself to be aggrieved by the proceedings and decree of the court of the Circuit Court of the United States for the District of Kansas made on the 2nd day of July, 1907, in the above entitled cause, and assigns errors thereto, as follows:

I.

The United States Circuit Court for the District of Kansas, which entered the decree of dismissal of said appellant's bill in said cause, erred, in dismissing the said suit and entering a final decree therein in favor of the said respondents for their costs against said appellant.

II.

The said court erred in that the grounds upon which the Special Master in Chancery based his report, upon the questions raised, as appears by the issues joined by the bill of complaint and demurrer filed by said respondents in the above-entitled cause do not constitute a suit against the United States by the common law, or any law, or Statute of the United States; and that by the Fifth Amendment to the Constitution of the United States, said appellant cannot be deprived of the jurisdiction of the court.

III.

41 The said court erred, in holding, and deciding upon the report of said Special Master in Chancery, that the said cause was not within the jurisdiction of the said court.

IV.

The said court erred, in making, rendering and entering a decree, adjudging want of jurisdiction, upon said bill of complaint.

V.

Wherefore the said Lyda B. Conley, appellant, prays the honorable court to examine and correct errors assigned, and for a reversal of the decree, of the court of the United States Circuit Court for the District of Kansas, entered in the above entitled cause.

LYDA B. CONLEY.

Endorsed: 8548 In the Supreme Court of the United States, October term, 1907 Lyda B. Conley, Appellant vs. James R. Garfield, Secretary of the Interior, et al., Respondents. Assignment of errors. Filed Dec. 30, 1907. Geo. F. Shariff, clerk. *Lyda B. Conley, att'y at Law*, 1712 *North 3rd Street Kansas City, Kansas* for appellant.

42 Know all men by these presents, That we, Lyda B. Conley and The Bankers Surety Co. are held and firmly bound unto James R. Garfield Secretary of the Interior, Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners in the full and just sum of Two hundred and fifty dollars to be paid to the said James R. Garfield, Secretary of the Interior Horace B. Durant, Thomas G. Walker and William A. Simpson, Commissioners, their successors, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 30 day of December in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the June term, A. D. 1907, of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, in a suit depending in said Court between Lyda B. Conley plaintiff, and James R. Garfield, Secretary of the Interior, Horace B. Durant Thomas G. Walker, and William A. Simpson, Commissioners defendants a decree was rendered against the said Lyda B. Conley and the said Lyda B. Conley has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and citation directed to the said James R. Garfield, Secretary of the Interior, Horace B. Durant, Thomas G. Walker and William A. Simpson, Commissioners citing and admonishing them to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, That if the said Lyda B. Conley shall prosecute said appeal to effect, and answer all damages and costs if she fail to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

LYDA B. CONLEY. [SEAL.]

[SEAL.] THE BANKERS SURETY COMPANY. [SEAL.]

By ROBT H. GARVER. [SEAL.]

Attorney in Fact for Kansas.

Approved by

JOHN C. POLLOCK, *Judge.*

43 [Endorsed:] No. 8548. United States Circuit Court. First Division of the Judicial District of Kansas. Lyda B. Conley vs. James R. Garfield, Sec'ty of Interior et al. Bond $250.00. Filed 30 day of December, 1907. Geo. F. Sharitt, Clerk.

44 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings of said court in case No. 8548 wherein Lyda B. Conley is plaintiff and James R. Garfield, Secretary of the Interior, et al., are defendants.

I further certify that the Original Citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 3rd day of January A. D. 1908.

[The Seal of the Circuit Court of the United States, 1862, District of Kansas.]

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: File No. 21,023. Kansas C. C. U. S. Term No. 77. Lyda B. Conley, appellant, vs. James R. Garfield, Secretary of the Interior, and Horace B. Durant, Thomas G. Walker and William A. Simpson, commissioners. Filed February 17th, 1908. File No. 21,023.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

In Equity. No. 77.

LYDIA E. CONLEY, Appellant,

vs.

JAMES R. GARFIELD, Secretary of the Interior, HORACE P. DUBANT, THOMAS G. WALKER, and WILLIAM A. SIMPSON, Commissioners, Respondents.

BRIEF.

Lydia E. Conley.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

In Equity. No. 77.

LYDA B. CONLEY, APPELLANT,

vs.

JAMES R. GARFIELD, SECRETARY OF THE INTERIOR; HORACE B. DURANT, THOMAS G. WALKER, AND WILLIAM A. SIMPSON, COMMISSIONERS, RESPONDENTS.

BRIEF.

Appellant's Statement of Case and Assignments of Error Respecting the Jurisdiction of the Circuit Court of the United States, Kansas District.

This suit was commenced June 11, 1907, in the Circuit Court of the United States for the District of Kansas. The prayer of the bill is for a permanent injunction to prevent and enjoin the desecration and sale of the public Indian burying ground, known as Huron Cemetery, and located in Kansas City, Kansas, which was reserved and appropriated under the second article of the treaty of January 31, 1855, by and between the Wyandotte Nation of Indians and the

United States of America, and which contains the remains of parents, relatives, and ancestors of said plaintiff.

Said bill for injunction was filed by Lyda B. Conley, of Kansas City, Kansas, a citizen Wyandotte Indian and a beneficiary of aforesaid appropriation and dedication, and brought against James R. Garfield, Secretary of the Interior, and Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners, who, claiming authority under color of an unconstitutional act of Congress of June 21, 1906, providing for the sale and desecration of said public burying ground, established headquarters in room 13, Federal Building, Kansas City, Kansas, and thereby threatened to carry into effect the provisions of said unconstitutional act of Congress, to the irreparable loss and injury of the vested rights of said plaintiff in and to said burying ground.

The said cause having come up for a hearing July 1, 1907, the bill and demurrer thereto herein were referred to Charles Blood Smith, Esquire, special master in chancery. Said master having reported, July 2, 1907, that the Circuit Court was without jurisdiction to entertain the bill, to which exceptions were taken thereto herein, and bill of exceptions filed July 20, 1907, it was ordered, adjudged, and decreed that for want of jurisdiction said bill of complaint herein be and the same was dismissed, with costs to the defendants to be taxed.

Twenty days having been allowed said plaintiff in which to file an amended bill of complaint for the purpose of presenting the question of the jurisdiction of the Circuit Court to the Supreme Court of the United States, an appeal was taken thereto herein to this honorable court, and errors assigned thereto as follows:

I.

The Circuit Court of the United States for the District of Kansas, in dismissing said bill of complaint for want

of jurisdiction, in adjudging costs, erred, because, if a court holds that it has no jurisdiction whatever of a cause, it cannot give judgment for costs.

Bates' Fed. Equity Procedure, vol. II, page 873, paragraph 845:

> "No costs when suit is dismissed for want of jurisdiction.—When a Circuit Court of the United States dismisses a suit for want of jurisdiction, it has no power to render a judgment or decree for costs." Citizens' Bank *v.* Cannon, 164 U. S., 319; Inglee *v.* Coolidge, 2 Wheat., 363; Hornthall *v.* The Collector, 9 Wall., 560, 566; Blacklock *v.* Small, 127 U. S., 96.

In the case of Citizens' Bank of Louisiana, appellant, *v.* Clifton Cannon, Sheriff of Avoyelles Parish, *et al.*, appeal from a decree of the Circuit Court of the United States for the Western District of Louisiana, dismissing for want of jurisdiction a suit in equity brought by the Citizens' Bank of Louisiana against Clifton Cannon *et al.*, sheriffs, respectively, of a number of parishes in Louisiana, to enjoin them from enforcing the payment of taxes by the plaintiff, Mr. Justice Shiras, delivering the opinion of the court, said:

> "Where the court has dismissed the suit for want of jurisdiction, it has no power to decree the payment of costs and penalties; it can only strike the case from the docket."

In Inglee *v.* Coolidge, 15 U. S., 2 Wheat., 363 (4:261), it was said by the Chief Justice that "this court does not give costs where a cause is dismissed for want of jurisdiction."

In Hornthall *v.* Keary, 76 U. S., 9 Wall., 566 (19:562), where the Circuit Court of the United States for the District of Mississippi had dismissed a bill for want of jurisdiction, and had awarded costs to the respondents, this court reversed the decree for that reason, and remanded the cause, with

directions to dismiss the bill of complaint, but without costs.

Blacklock *v.* Small, 127 U. S., 96 (32:70).

And furthermore in U. S. Supreme Court Practice (page 5), Mr. May says:

> "The rule is well established that where a Circuit Court of the United States erroneously takes jurisdiction of a cause, and the Supreme Court, in the exercise of its jurisdiction, corrects the error on that ground by reversing the judgment, a judgment for costs may be entered. If, however, a court holds that it has no jurisdiction whatever of a cause, it cannot give judgment for costs, and order that an execution shall issue to collect them; where there is no jurisdiction, there is no power in the court to do anything but strike the cause from the docket, and its award of costs and execution, would be *coram non judice*, and consequently void."

In the case of The Mayor *v.* Cooper, 6 Wall., 247, 250, Mr. Justice Swayne, who delivered the opinion of the court, said:

> "This cause is brought before us by writ of error to the Circuit Court of the United States for the Middle District of Tennessee. The defendant in error brought the suit in the Circuit Court of Davidson County in that State. The declaration alleges trespasses upon real estate and asportation and conversion of chattels. The mayor and aldermen pleaded the general issues."

The court held that where a court has no jurisdiction of a case it cannot award costs, or order execution for them to issue. And furthermore said:

> "Before adverting to the constitutional question there is another feature of the order which calls for remark. The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for

the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be, and the award of costs and execution was consequently void. Such was the necessary result of the conclusion of the court."

"Where a court has no jurisdiction it has no power to do anything but strike the case from the docket, and award of costs and execution is void."

II.

The said court erred in accepting the Special Master's report upon the grounds which said Special Master based his report, because the Circuit Court of the United States has jurisdiction to enjoin the acts of individuals, who, claiming authority under color of an unconstitutional act of Congress, invade personal or property rights to the injury of said plaintiff, without due process of law.

Cooley's Const. Lim., 7th ed., page 28, Mr. Lane (in note), says:

"Where officers of the United States are in possession of land and claim to hold for the United States, and are sued as trespassers, the case may be reviewed in the Federal Court (Stanley *v.* Schwalby, 147 U. S., 508; 13 Sup. Ct. Rep., 418). Accordingly, whenever it can be clearly seen that a State is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or prop-

> erty, in which his defense is that he has acted under the orders of the Government.
>
> "In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included United States *v.* Lee, 106 U. S., 196 (27:171), where an action of ejectment was held to be in its essential character an action of trespass, with power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense."

In United States Supreme Court Practice, page 102, Mr. Heber J. May says:

> "It is a settled doctrine of the Supreme Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the Eleventh Amendment of the Constitution of the United States." (Smyth *v.* Ames, 169 U. S., 466, 518, 519; Tindel *v.* Wesley, 167 U. S., 204, 220; Scott *v.* Donald, 165 U. S., 58, 68; *In re* Tyler, 149 U. S., 164, 190; Pennoyer *v.* McConnaughty, 140 U. S., 1, 10.)

In Tindel *v.* Wesley, 167 U. S., 213, Mr. Justice Harlan, in delivering the opinion of the court, said:

> "The leading case upon the subject is United States *v.* Lee, 106 U. S., 196 (27:171). It is true that the question there presented was whether the suit was one against the United States within the recognized rule that the government without its consent cannot be sued directly in any court by original process as a defendant. But it cannot be doubted that the ques-

tion whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."

Mr. Cooley in his Commentaries on Torts, 2d edition, page 830, observes that—

"It has been shown, also, that when a government official assumes an authority which the law does not warrant him in exercising, he is personally responsible, whatever may have been his motive. The discussions in Milligan's case cover this point very fully. (NOTE.—*Ex parte* Milligan, 4 Wall., 3. See Planters' Bank *v.* Union Bank, 16 Wall., 483; Mitchell *v.* Harmony, 13 How., 115; Griffin *v.* Wilcox, 21 Int., 370; Johnson *v.* Jones, 44 Ill., 166; Wilson *v.* Franklin, 63 N. C., 259; Hogue *v.* Penn., 3 Bush., 663. If persons, while claiming to act as State officers, invade private rights under color of authority unconstitutional and void they are liable. United States *v.* Lee, 106 U. S., 196; Cunningham *v.* Macon, etc., Co., 109 U. S., 446; Poindexter *v.* Greenhow, 114 U. S., 270.)"

In Black's Constitutional Law, page 131, Mr. Black says:

"The rule is thus settled. If the suit is brought against the officers of the State as representing the State's action or liability, or demands affirmative official action on the part of the defendants to secure the performance of an obligation which belongs to the State in its political capacity, the effect is to make the State itself a real party, against which the judgment will so operate as to compel it to perform its contracts, and the suit is not maintainable. But if the suit is brought against defendants who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State, and thus make themselves trespassers and personally liable, in that case, whether suit is brought to recover money or property, or for damages, or for injunction or man-

damus, it is not within the meaning of the Eleventh Amendment, an action against the State."

Pennoyer *v.* McConnaughty, 140 U. S., 1; 11 Sup. Ct., 699.

In re Ayres, 123 U. S., 443; 8 Sup. Ct., 164.

Hagood *v.* Southern, 117 U. S., 52, 6 Sup. Ct., 608.

Osborn *v.* Bank of U. S., 9 Wheat., 738.

Antoni *v.* Greenhow, 107 U. S., 769; 2 Sup. Ct., 91.

Davis *v.* Gray, 16 Wall., 203.

Board of Liquidation *v.* McComb, 92 U. S., 531.

Poindexter *v.* Greenhow, 114 U. S., 270; 5 Sup. Ct., 903, 962.

Louisiana *v.* Jumel, 107 U. S., 711; 8 Sup. Ct., 292, 609.

U. S. *v.* Lee, 106 U. S., 196; 1 Sup. Ct., 240.

Century Digest, volume 13, "Courts," section 844½ (U. S., 1885):

"A Federal court has jurisdiction over a State officer, in questions arising under the Constitution, laws, etc., of the United States, where the law has imposed upon him a well-defined duty in regard to a specific matter not affecting the general powers or functions of government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process; and, when it shall be necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by injunction, compel the performance of the appropriate duty, or enjoin the officer from doing what is inconsistent with that duty and with the plaintiff's rights in the premises. Parsons *v.* Marye (C. C.), 23 Fed., 113."

In Principles of Constitutional Law, Mr. Cooley, in commenting on "Protection to Property," page 345, observes:

"The Constitution—the Fifth Amendment to the Constitution—provides that no person shall be deprived of property without due process of law. This

provision is a restraint upon the Federal powers only. The Fourteenth Amendment supplements this by providing that no State shall deprive any person of property without due process of law."

"*What is Property?*—That is property which is recognized as such by the law, and nothing else is or can be. 'Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases.' In America the law which determines what is property is for the most part the common or customary law, though to this some additions are made by statute. Whatever a man produces by the labor of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment and disposition of" * * * (page 347).

"*Who Restrained?*—The prohibitions of the Constitution apply to all departments of government, and to all private citizens. The executive must of course always show authority of law for his action, and when this is out of his power, what he does cannot be by due process of law. All ministerial officers must show warrant for everything they assume to do in apparent disturbance of the rights of others. The judiciary, from the highest court to the lowest, must exercise its authority within the limits permitted by law, or it will act without jurisdiction, and therefore without due process" * * * (page 350).

"*Divesting Rights by Legislation.*—The legislature makes the laws, but cannot pass judgments or decrees, or make a law that is such in substance. It must govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough" * * * (page 351).

"*Vested Rights.*—The test of unlawful interference with property is that vested rights are abridged or taken away. Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

"*Trust Interests.*—Where one holds property for another, the vested right which the law regards is not that of the trustee, but of the beneficiary."

And Mr. Sutherland, in his "Notes on the United States Constitution," page 78, observes that—

"The nature of society and of government establish certain limitations upon legislative power apart from constitutional provisions; there are limitations upon such power which grow out of the essential nature of all free governments, and an act of the legislature contrary to the great first principles of the social compact cannot be deemed a rightful exercise of legislative authority. Calder *v.* Bull, 3 Dall, 388; 1 L. Ed., 648; Poindexter *v.* Greenhow, 114 U. S., 297; 5 Sup. Ct., 918; 29 L. Ed., 185; Wilder *v.* Chicago, etc., R. R., 70 Mich., 385; 38 N. W., 290; Janesville *v.* Carpenter, 77 Wis., 303; 20 Am. St. Rep., 134; 46 N. W., 132; 8 L. R. A., 808."

In Poindexter *v.* Greenhow, 114 U. S., 273, 297, Mr. Justice Matthews said:

"In this case the plaintiff in error, who was also plaintiff below, brought his action *in detinue* on the 25th day of April, 1883, against Samuel C. Greenhow, for the recovery of specific personal property, to wit: one office desk of the value of $30, before a police justice in the city of Richmond, who dismissed the case for want of jurisdiction." * * *

"What we are asked to do is, in effect, to overrule the doctrine in Fletcher *v.* Peck, 6 Cranch, 87, and hold that a State is not under a constitutional obligation to perform its contracts; for it is equivalent to that to say that it is not subject to the consequences when that constitutional prohibition is applied to suits between individuals. We could not stop there. We should be required to go still further, and reverse the doctrine on which that constitutional provision rests, stated by Chief Justice Marshall in that case when he said: 'When, then, a law is in its nature a contract, when absolute rights have vested under that

contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection.' And, in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said, in Marbury v. Madison, 1 Cranch, 137: 'The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.'"

And, quoting Andrews' American Law (note), page 126:

> "Property.—John Marshall (afterward Chief Justice of the Supreme Court of the United States), speaking of the legal conception of property, said: 'It is not necessary to inquire how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject in all respects to the disposition and control of civil institutions.' * * *
>
> "It must be repeated that the law of property in its origin and operation is the offspring of the social state, not incident of a state of nature. Argument, Ware *v.* Hylton, 3 Dall., 211."

National Supreme Court: "The words life, liberty, and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdi-

visions of all civil rights. The term 'property' in this clause embraces all valuable interests which a man may possess *outside of himself*, that is to say, outside of his life and liberty. It is not confined to mere technical property, but extends to every species of vested rights." Camp *v.* Holt, 115 U. S., 620; Board of Education *v.* Blodgett, 115 Ill., 441.

New Hampshire Supreme Court: "If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use' is the real side of property." Eaton *v.* Boston, Concord, and Montreal R. R., 51 N. H., 504; S. C. 12 Am. Rep., 151.

Mr. John Ordronaux, in his comments on Constitutional Legislation, page 254, defines:

> "The phrase 'due process of law,' or the 'law of the land,' the latter having come down from Magna Charta, was in its original significance intended to describe that regular form of judicial proceeding which is permanently established for the government of communities, in contra-distinction from those summary measures which in England had been permitted to disgrace the administration of justice, down even to the time when our Constitution was framed. Under a parliamentary government, and a flexible constitution altered and shaped to suit the varying moods of political majorities, it had been made possible to enact laws of a most despotic character, and destructive of both personal liberty and of property rights. Acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures had all been witnessed as emanations from the law-making power. As such, their obligatory character made them the law of the land, irreversible by any of its tribunals.

"The memory of these acts, from some of which they had themselves suffered, led the framers of the Constitution to introduce into that instrument this insuperable barrier against arbitrary judicial proceedings. And since every enactment is not necessarily the 'law of the land,' particularly when it may chance to be a special statute addressed to the rights of an individual or a locality, the phrase 'due process of law' has a general meaning covering with impartial equality all the civil rights of all the citizens. Under 'due process of law,' therefore, a citizen cannot be deprived of his right to life, liberty, or property, except after a trial conducted according to a system of judicial procedure established for the protection of the entire community in the enjoyment of these same rights, and applicable to the same class of cases as the one in question. The phrase does not always mean trial by jury, nor trial by any particular tribunal, or number of judges, but it means trial had, proof adduced, and judgment rendered under, and according to a general system of law which the community has established for the protection of the civil rights of all its members." Murray *v.* Hoboken Land Co., 18 How., 272; U. S. *v.* Taylor, 3 McLean, 539; Westerwelt *v.* Gregg, 12 N. Y., 204; Pennoyer *v.* Neff, 95 U. S., 714; Wynehamer *v.* People, 13 N. Y., 132; Mayo *v.* Wilson, 1 N. H., 55; Porter *v.* Taylor, 1 Hill, 140; Story on Const., par. 1789; Hurtado *v.* California, 110 U. S., 516; Walker *v.* Savinet, 92 U. S., 90; Stuart *v.* Palmer, 74 N. Y., 101.

In Sutherland's "Notes on the United States Constitution," page 644, Mr. Sutherland, in speaking of "due process of law," says:

> "If, upon examination, an act passed by Congress is shown not to be in conflict with the Constitution, regard should be had to the law and usage in England obtaining before the Declaration of Independence to see if it accords with the process prescribed by Congress. Under this amendment one

cannot be condemned as to his person or property without opportunity to be heard."

Den *v.* Hoboken Land, etc., Co., 18 How., 277; 15 L. Ed., 372.

Lowe *v.* Kansas, 163 U. S., 85; 16 Sup. Ct., 1031; 41 L. Ed., 78.

Lasere *v.* Rochereau, 17 Wall., 438; 21 L. Ed., 694.

Orchard *v.* Alexander, 157 U. S., 373; 15 Sup. Ct., 635; 39 L. Ed., 737.

In Lasere *v.* Rochereau, *supra*, Mr. Justice Swayne said:

> "It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard," citing McVeigh *v.* U. S., 11 Wall. 267; 20 L. Ed., 81.

Mr. Sutherland furthermore observes (page 650) that "the constitutional guaranty carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty" (State *v.* Julow, 129 Mo., 163; 50 Am. St. Rep., 443; 31 S. W. Rep., 781; 29 L. R. A., 257); "and it is expected that the courts will enforce it even against persons assuming to act under the authority of the Government" (U. S. *v.* Lee, 106 U. S., 196; 1 Sup. Ct., 240; 27 L. Ed., 171).

In State *v.* Julow, 129 Mo., 163, the Supreme Court of Missouri held that—

> "Depriving an owner of property of one of its essential attributes is depriving him of his property within the meaning of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law means that their enjoyment shall be controlled by the general rules which govern society and not that anything which passes under the form of an enactment shall be considered the law of the land.
>
> "Sherwood, judge, page 174, says: 'The law of the land' and 'due process of law' are the legal equiva-

lents of each other. Touching this topic, a distinguished jurist observes: 'Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'" Cooley, Const. Lim. (6 ed.), 431.

"Comstock, J., when discussing a constitutional prohibition such as ours, said: 'No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that the 'law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. * * * Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life.'" Wynehamer *v.* People, 3 Kernan (N. Y.), 378.

And in "Courts and their Jurisdiction," Mr. John D. Works, in speaking of "due process of law," says:

> "The Constitution of the United States provides that no State shall deprive any person of life, lib-

> erty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. * * * It is not confined to judicial proceedings, but extends to every case or proceeding which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. And these provisions of the Constitution are alike applicable to laws enacted by Congress (Den *v.* Hoboken Land & Imp. Co., 18 How., 272).
>
> "The amendment of the Constitution, article 5, is a limitation upon the powers of Congress and the Federal judiciary, and does not apply to the State authorities."

In Desty's Federal Procedure, volume I, page 12 (9th edition), Mr. Folsom observes:

> "This amendment simply declares the great common-law principle as to personal rights, applicable to both State and Federal governments. * * * The legislature has no power to take property from one individual and give it to another (Turner *v.* Althaus, 6 Neb., 54). It is intended that courts shall enforce this provision even against persons assuming to act under the authority of the Government" (U. S. *v.* Lee, 106 U. S., 196).

And, as further stated by same author, *supra*, page 44, that "due process of law" means such an exertion of the powers of government as the settled maxims of the law permit and sanction (Bertholf *v.* O'Reilly, 18 Am. Law. Reg., N. S., 119; *Ex parte* Ah Fook, 49 Cal., 402). It simply requires that a person should be brought into court and have an opportunity to prove any fact for his protection (People *v.* Essex Co., 70 N. Y., 229). It means law in its regular course of administration through courts of justice.

And, as stated by Mr. Black in his comments on constitutional law, page 417, respecting "due process of law:

> "By the provisions of the Federal Constitution, both the United States and the several States are pro-

hibited from depriving any person of his life, liberty, or property without due process of law." * * * (Page 418:) "When the Government, through its established agencies, interferes with the title to one's property or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws and not generally by rules that pertain to forms of procedure merely. Cooley's Const. Law, 356." * * *

(Page 419:) "The law of the land means the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means, in each particular case, such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. 'As to the words from Magna Charta incorporated in the Constitution, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'" Bank of Columbia *v.* Okely, 4 Wheat., 235, 244.

See also Leeper *v.* Texas, 139 U. S., 462; 11 S. Ct., 577, in which Mr. Chief Justice Fuller said:

> "Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right."

Mr. Black furthermore observes (page 420) that—

> "We should also notice that a State cannot deprive an owner of his property without due process of law

through the medium of a constitutional convention any more than it can through an act of legislation." Clark *v.* Mitchell, 69 Mo., 627.

Mr. Chief Justice Sherwood, in construing constitutional law, Federal and State, says:

> "The court adheres to its decision in this case heretofore reported in 64 Mo., 564, against the validity of the act of Congress of March 3d, 1863, under which the plaintiff's rents were confiscated by the military authorities of the United States."

And in "Principles of Constitutional Law" (page 136) Mr. Cooley remarks:

> "But where an officer, claiming to act as such, under color of unconstitutional laws, invades property or rights acquired under contracts with the State, and makes himself a trespasser by attempting to enforce a void authority, it is immaterial to the jurisdiction who undertook to confer the void authority, since he is responsible individually, on well-settled common law principles." United States *v.* Lee, 106 U. S., 199; Poindexter *v.* Greenhow, 114 U. S., 270; Pennoyer *v.* McConnaughty, 140 U. S., 1; *In re* Tyler, 149 U. S., 164; Tindal *v.* Wesley, 167 U. S., 204.

In Union Trust Co. *v.* Stearns, 119 Fed. Rep., 794, the court said:

> "The same doctrine has been applied to another class of cases in which suit has been brought against State officers. These are cases where the State officers compose a board or commission endowed by legislative enactment with administrative powers which cannot be enforced without violating constitutional rights. It is held that these suits are not against the State in any proper sense, but against the individuals composing the board or commission, who, as individuals, though claiming to act as officers, are threatening a violation of personal or property rights under the color of an unconstitutional statute. Pennoyer

v. McConnaughty, 140 U. S., 1; 11 Sup. Ct., 699; 35 L. Ed., 363; Reagan *v.* Trust Co., 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014; Smyth *v.* Ames, 169 U. S., 466; 18 Sup. Ct., 418; 42 L. Ed., 819."

And Mr. Brown, in his commentaries "On Jurisdiction," 2d ed., page 8, "how invoked," cites Murray's Lessee *v.* Hoboken Land Co., 18 How., 272:

> "No man shall be condemned unheard. The jurisdiction and power of a court remain at rest until called into action by some suitor; it cannot by its own act institute a proceeding *sua sponte*. The action of the court must be called into exercise by pleading and process, procured or obtained by some suitor by filing a declaration, complaint, petition, or in some form requesting the exercise of the power of the court."

III.

The said circuit court, in holding and deciding, upon the said report of the special master in chancery, that the said cause was not within the jurisdiction of the said court, erred, because rights of persons and property, not political rights, are subjects of judicial power, and that the judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated power or be an assumption of power beyond the grants in the Constitution.

Ableman *v.* Booth, 21 How., 506, 520.

In the case of Fifth National Bank *v.* Long, 7 Biss., 502, Federal case No. 4780 (page 503), the court said:

> "It is true the old English rule holds that the King cannot be sued in his own court, or the sovereign cannot be sued here in its own court, and that rule is carried so far in England that the King cannot be sued for debt or trespass, but Mr. Justice Greer, in Elliott *v.* Van Voorst, 3 Wallace (Jr.), 299 (Fed. case No. 4390), seems to think that there may be such a thing as a distinction between the United

> States as a sovereign in executing its prerogatives of sovereignty and the United States as a property-holder."

And, in the case of Elliot *v.* Van Voorst *et al.*, the court, in speaking of the sovereignty of the United States as affecting its subjection to suit, held that—

> "The rights of the United States Government, as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it.
>
> "When it purchases land within a State, not intended for forts, arsenals, and other national uses, but merely to secure a debt, it takes the land as any other corporation, and cannot claim any of the immunities or prerogatives of a sovereign.
>
> "Consequently, a mortgagee may have a valid decree in chancery for the sale of the mortgaged land, where the United States is owner of the equity of redemption, on a notice given in any manner the court may prescribe.
>
> "The jurisdiction of the chancellor to order such sale depends on the locality of the land, and not on the domicile of the owner of the equity of redemption. The regularity of such a sale cannot be called in question in a collateral suit."

Mr. Justice Grier (page 303) said:

> "When Van Voorst came into the court of chancery, he had a clear right to have the mortgaged lands sold to satisfy his mortgage. The court was bound to furnish him a remedy. The land mortgaged was within the jurisdiction of the court. The only difficulty in the case was, that the title of the mortgagor, who should be made a party to the proceeding and have an opportunity to show that lien was paid or discharged, was vested in the United States, *quoad hoc*, a foreign corporation, and not within the jurisdiction of the court. It could not be compelled to appear or submit itself to such jurisdiction, so neither could any non-resident individual or corporation.

> The classes of cases in which a State is not a necessary party, though some interest of it may be more or less affected by the decision, and of which the circuit court has jurisdiction, stated and distinguished."

As stated by Mr. Justice Miller, in Cunningham *v.* Macon & B. R. R. Co., 109 U. S., 446, 451 (27,992, 994), "it may be accepted as unquestioned that neither the United States nor a State can be sued as defendant in any court in the country without their consent, except in the limited class of cases in which a State may be made a party in this court by virtue of the original jurisdiction conferred by the Constitution."

And further in same case, *supra* (page 452), the court observes that—

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.
>
> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." See Mitchell *v.* Harmony, 13 How., 115; Bates *v.* Clark, 95 U. S., 204; Meigs *v.* McClung, 9 Cranch, 11; Wilcox *v.* Jackson, 13 Pet., 498; Brown *v.* Huger, 21 How., 305; Grisar *v.* McDowell, 6 Wall., 363.
>
> "To this class belongs also the recent case of United States *v.* Lee, 106 U. S., 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and, therefore, insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthor-

ized trespassers, and turned them out of their unlawful possession.

"A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public officers as in Marbury *v.* Madison, 1 Cranch, 137; Kendall *v.* Stokes, 3 How., 87; United States *v.* Schurz, 102 U. S., 378; United States *v.* Boutwell, 17 Wall., 604.

"But in all such cases, from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial and must involve no element of discretion to be exercised by the officer.

"It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree, or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises.

"Perhaps the strongest assertion of this doctrine is found in the case of Davis *v.* Gray, 16 Wall., 203 (83 U. S., XXI, 447).

"In that case, the State of Texas having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the commissioner of the State land office and the Governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from doing this by its decree, which was affirmed in this court."

And in the case of Union Trust Co. *v.* Stearns, 119 Fed. Rep., 793, Judge Colt said:

"There is a class of cases in which the Supreme Court has held that a suit against State officers was

not a suit against the State. The principle governing these cases is not applicable to the present suit. Briefly stated, that principle is that such officers, as individuals, have committed or are about to commit, a wrong or trespass, for which they are personally liable, in a suit at law or in equity. This doctrine was first enunciated by Chief Justice Marshall, in Osborn *v.* Bank, 9 Wheat., 638, 871; 6 L. Ed., 204. In that case there was an unlawful seizure and detention of property by State officers in pursuance of an unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank; and an action at law, either in trespass or detinue, could have been brought against them as individual trespassers guilty of wrong in taking the property of the complainant illegally. Under such circumstances they were not permitted to protect themselves against personal liability as representatives of the State, because the authority under which they professed to act was void. *Ex parte* Ayres, 123 U. S., 199, 500, 8 Sup. Ct., 164; 31 Law Ed., 216.

"In Allen *v.* Railroad Company, 114 U. S., 311; 5 S. Ct., 925, 962; 29 L. Ed., 200, the same principle was enforced against State officers to restrain the collection of taxes by seizure of property under an unconstitutional legislative act.

"In Poindexter *v.* Greenhow, 114 U. S., 270; 5 Sup. Ct., 903, 926; 29 L. Ed., 185, the same doctrine is stated and applied. United States *v.* Lee, 106 U. S., 196; 27 L. Ed., 171, is another illustration of the same principle. In that case the plaintiffs had been wrongfully dispossessed of their real estate by the defendants, claiming to act under the authority of the United States. As they were unable to show any such lawful authority, it was held that there was nothing to prevent the judgment of the court against them as individuals for their individual wrong and trespass. In reviewing this class of cases in *Ex parte* Ayres, Mr. Justice Matthews speaking for the court said:

"'The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which

> they are personally and individually liable. * * * This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrong-doer in his individual character.' 123 U. S., 500, 501, 502; 8 Sup. Ct., 164; 31 L. Ed., 216."

In Field's Federal Courts, page 113, paragraph 122, Mr. Field, in discussing "Suits arising under the Constitution or laws of the United States," says:

> "If a State law is in conflict with the Constitution of the United States, and a State officer is about to execute it, this would be a proper case for the exercise of the original jurisdiction of a circuit court to restrain him. And the court may proceed in such a case to a decree against an officer of the State in all respects as if the State were a party to the record." Osborn *v.* Bank of U. S., 9 Wheat., 638; Dodge *v.* Woolsey, 18 Howard, 331; State Bank *v.* Knoop, 16 How., 369; Jefferson Bank *v.* Skelly, 1 Black, 436; Ohio L. & F. Co. *v.* De Bold, 18 How., 380; Davis *v.* Grey, 16 Wall., 203.

In the case of Osborn *v.* Bank of U. S., 9 Wheat., 738, the court said:

> "In general, an injunction will not be allowed, nor a decree rendered against an agent when the principal is not made a party to the suit; but if the principal be not himself subject to the jurisdiction of the court (as in the case of a sovereign State), the rule may be dispensed with. A court of equity will interpose by injunction, to prevent the transfer

of a specific thing, which, if transferred will be irretrievably lost to the owner, such as negotiable securities and stocks.

"The circuit courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and as a State itself cannot, according to the 11th Amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws." Davis *v.* Gray, 16 Wallace, 203.

"The doctrine of Osborne *v.* The Bank of the United States affirmed, and the principles redeclared.

"(*a*) That a circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(*b*) That where a State is concerned the State should be made a party, if it can be done. That it cannot be done is sufficient reason for the omission to do it, and the court may proceed to decree against her officers in all respects as if she were a party to the record.

"(*c*) That in deciding who are parties to the suit the court will not look beyond the record. The making of a State officer a party does not make the State a party, although her law may prompt his action, and she may stand behind him as the real party in interest; that a State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In the case of Poindexter *v.* Greenhow, 114 U. S., 291, Mr. Justice Matthews, speaking for the court, said:

"Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often with the blood of martyrs shed upon the battle-field and the scaffold, if their

limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked; and of communism, which is its twin; the double progeny of the same evil birth."

In Smyth *v.* Ames, 169 U. S., 518, Mr. Justice Harlan said:

"Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction, consistently with the 11th Amendment of the Constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State board. It would therefore be sufficient to say that these cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction, not only upon the ground of diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that within the meaning of the 11th Amendment of the Constitution the suits are not against the State, but against

> certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment." Pennoyer *v.* McConnaughy, 140 U. S., 1, 10 (35:363; 365); *Re* Tyler, 149 U. S., 164, 190 (37:689, 698); Scott *v.* Donald (No. 1), 165 U. S., 58, 68 (41:632, 633); Tindal *v.* Wesley, 167 U. S., 204, 220 (42:137, 142).

In the "Law of Citizenship," Mr. Prentiss Webster, in observing "The divisions of government of a society" (page 47), says:

> "The government of a society falls into three departments, and to each department are assigned powers. The assignment of these powers is found in the compact by which society is formed. These departments are known as the legislative, the executive and the judiciary.
>
> "In the legislative department rules of conduct and other necessary laws for the government of the members of the society are enacted.
>
> "In the executive department, is the power by which the laws enacted by the legislative department are enforced.
>
> "In the judiciary department, are interpreted the laws enacted in the legislative department."

And the same author, on "What constitutes full membership or citizenship in a society," further remarks:

> "Full citizenship is the enjoyment of all the rights and privileges which the laws of a society allow to its members when at home, and equal protection when abroad. It consists of
>
> "First. In the privilege accorded to members of participating in the legislative branch of the govern-

ment, of legislating and being represented in the legislative department.

"Second. Subjection to the executive branch.

"Third. The right to have rights determined and wrongs redressed in the judiciary department.

"Fourth. There being no grades or degrees of citizenship, the privilege to call for protection from his government when abroad equally with other citizens of the State of which he is a member.

" 'In regard to the protection of our citizens in their rights at home and abroad, we have no law which divides them into classes or makes any difference whatever between them.' 9 Op. Att'y-Gen'l, 356."

In Blair *v.* Silver Peak Mines, 93 Fed. Rep., 335, Mr. Hawley, district judge, said:

"The general rule is well settled that a citizen is one who owes the government allegiance, service, and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of suit and of defense, and security in person; estate, and reputation." Knox *v.* Greenleaf, 4 Dall., 360; Gassies *v.* Ballon, 6 Peters, 761; Shelton *v.* Tiffin, 6 How., 163, 185; Sheppard *v.* Graves, 14 How., 512, 513; Minor *v.* Happersett, 21 Wall., 162, 166; U. S. *v.* Cruikshank, 92 U. S., 542; Anderson *v.* Watt, 138 U. S., 695, 706, 11 Sup. Ct., 449; Boyd *v.* Nebraska, 143 U. S., 135, 159, 12 Sup. Ct., 375; Gordon *v.* Bank, 144 U. S., 97, 103, 12 Sup. Ct., 657; Marks *v.* Marks, 75 Fed. Rep., 321.

Mr. Sutherland, in his "Notes on the United States Consitution," page 569, in defining "Who are citizens," says:

"The word 'citizen,' in its largest sense, means a native-born or naturalized person who is entitled to protection in the exercise and enjoyment of his private rights. As used in the Constitution, it means a member of the nation owing allegiance thereto and entitled to protection therefrom. * * *

"The term 'citizen' is often used to convey the idea of membership in a nation, and in that sense a woman

is a citizen when born within the jurisdiction of the United States." Minor *v.* Happersett, 21 Wall., 166; 22 L. Ed., 627; *In re* Lockwood, 154 U. S., 117; 14 Sup. Ct., 1082; 38 L. Ed., 929.

(Page 570:)

> "'A citizen of the United States is a citizen of the State where he resides.' (Gassies *v.* Ballon, 6 Pet., 762; 8 L. Ed., 573; Marks *v.* Marks, 75 Fed., 328; Easterly *v.* Goodwin, 35 Conn., 286; 95 Am. Ded., 239), 'and the admission of a territory on an equal footing with the original States involves the adoption of its inhabitants as citizens of the United States.'" (Boyd *v.* Thayer, 143 U. S., 170; 12 Sup. Ct., 375; 36 L. Ed., 103.)

In United States *v.* Cruikshank, 92 U. S., 542, 549 (23: 588, 590), Mr. Chief Justice Waite, delivering the opinion of the court, said:

> "Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as collective rights."

Mr. Justice Story, in his Commentaries on the Constitution, says:

> "Every citizen of a State is *ipso facto* a citizen of the United States" (sec. 1693). "And this is the view expressed by Mr. Rawle in his work on the Constitution" (chap. 9, pp. 85, 86).

Mr. Cooley, in his Commentaries on the "Principles of Constitutional Law," as to "how citizenship is acquired," observes:

> "The Fourteenth Amendment indicates the two methods in which one may become a citizen: *first*, by birth in the United States" * * * (page 269).

"The aboriginal inhabitants of the country may be said to be in an anomalous condition, so long as they preserve their tribal relations and recognize the headship of their chiefs, even when they reside within a State or an organized Territory, and owe a qualified allegiance to the Government of the United States. It would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience yielded by them to their tribal head, that they should be vested with the complete rights; or, on the other hand, charged with the full responsibility of citizens. Congress has provided that separate allotments of land may be made to Indians, and that any Indian born within the territorial limits of the United States, to whom an allotment has been made, or who has voluntarily taken up residence separate from any tribe and has adopted the habits of civilized life, is a citizen of the United States." Acts of 1887, 24 Stat. at Large, 388; Sup. Rev. Stat., i, 534; State *v.* Frazier, 28 Nebraska, 438; N. W. Rep., 471.

In Century Digest, volume 27, page 150 (U. S., 1874), we find—

"That an Indian born in Minnesota is *prima facie not* a member of an Oregon tribe, though he might become such by adoption." United States *v.* Wirt, Federal case No. 16745 (3 Sawyer, 161).

Mr. John Ordronaux, in his Commentaries on "Constitutional Legislation" (page 478), observes—

"That the powers of Congress do not extend beyond the regulation of commerce with Indian tribes as distinct tribal organizations; it cannot, therefore, pass laws invalidating contracts made with Indians within the limits of a State, but outside of a reservation." Taylor *v.* Drew, 21 Ark., 485; Hicks *v.* Euhartonah, 21 Ark., 106.

In Article I, section 1, Bill of Rights, State of Kansas, we find:

"All men are by nature free and independent, and have certain inalienable rights, among which are

> those of enjoying and defending life and liberty; acquiring, possessing, and protecting life and property, and seeking and obtaining safety and happiness."

Mr. Cooley, in his Commentaries on the "Principles of Constitutional Law" (page 367), says:

> "It is certain that no government can under any circumstances divest one citizen of his estate for the benefit of another—the public interest being in no way involved—and this whether compensation is made or not." Tyler *v.* Beacher, 44 Vt., 648; Bloodgood *v.* Mohawk, etc., R. R. Co., 18 Wend. (N. Y.), 9.

The same author, *supra* (page 163), in respect to "Judicial Restraints on Legislative Encroachments," observes:

> "The business of the courts is to apply the law of the land in such controversies as may arise and be brought before them. Their authority is co-ordinate with that of the legislature, neither superior nor inferior; but each with equal dignity must move in its appointed sphere." (Lindsey *v.* Commissioners, 2 Bay (S. C.), 61; Bates *v.* Kimball, 2 Chip. (Vt.), 77.) "But the judiciary, in seeking to ascertain what the law is which must be applied in any particular controversy, may possibly find that the will of the legislature, as expressed in statute form, and the will of the people, as expressed in the Constitution, are in conflict, and the two cannot stand together. In such a case, as the legislative power is conferred by the Constitution, it is manifest that the delegate has exceeded his authority; the trustee has not kept within the limits of his trust. The excess is therefore inoperative, and it is the duty of the court to recognize and give effect to the Constitution as the paramount law, and, by refusing to enforce the legislative enactment, practically nullify it." * * * (Page 166:) "The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party

before it against unwarranted exercise of legislative power to his prejudice. Wellington, petitioner, 16 Pick. (Mass.), 96; State *v.* Rich, 20 Mo., 393; Burnside *v.* Lincoln Co. Ct., 86 Ky., 423. To pass upon the constitutionality of an act is the ultimate and supreme function of the courts. 'It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between parties. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.'"

Chicago, etc., Ry. Co. *v.* Wellman, 143 U. S., 339.

Mr. Cooley, in the same commentaries (page 31), observes:

"The Congress of the United States derives its power to legislate from the Constitution, which is the measure of its authority; and any enactment of Congress which is opposed to its provisions, or not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one." Ableman *v.* Booth, 21 How., 506, 520; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629; Civil Rights Cases, 109 U. S., 3.

In Ableman *v.* Booth, *supra*, Mr. Chief Justice Taney, speaking for the court, said:

"This court has judicial power over all cases in law and equity arising under the Constitution and laws of the United States, and, in such cases, as well as others enumerated, has appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make."

(Page 520:) "The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution. * * * And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty

of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance of the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress."

Mr. Sutherland, in his "Notes on the United States Constitution," page 610, says:

"From the supremacy of the Constitution and laws of the United States it necessarily results that the interpretation of the Constitution and laws by the highest tribunal created by the Constitution must be equally supreme over the constitution and laws of the several States. The laws of the United States are supreme within the meaning of this clause only when made in conformity with the Constitution (Marbury *v.* Madison, 1 Cranch, 176; 2 Law Ed., 60; Pollock *v.* Farmers' Loan, etc., Co., 157 U. S., 554; 15 S. Ct., 679; 39 L. Ed., 759; *In re* Bogart, 2 Sawy., 396, Fed. Case No. 1596; *Ex parte* Selma, etc., R. R. Co., 45 Ala., 728; 6 Am. Rep., 727; Rison *v.* Farr, 24 Ark., 168; 87 Am. Dec., 56; Koehler *v.* Iowa, 60 Iowa, 656; 15 N. W., 635), and an act of Congress repugnant to the Constitution is void (Marbury *v.* Madison, 1 Cranch, 176; 2 L. Ed., 60; Ableman *v.* Booth, 21 How., 520; 16 L. Ed., 169).

"While the presumption is always in favor of the constitutionality of a legislative act, and the power to declare a statute void will never be exercised except in a very clear case, yet it is not only the right, but the duty, of the judiciary to pass upon the validity of statutes and to declare them void when their repugnancy to the constitution is apparent." Marbury *v.* Madison, 1 Cranch, 176-180, 2 L. Ed., 60; Mugler *v.* Kansas, 123 U. S., 661, 8 S. Ct., 297, 31 L. Ed., 205; McCulloch *v.* Brown, 11 S. C., 243, 19 S. E., 471, 23 L. R. A., 110; *In re* Jacobs, 98 N. Y., 112, 50 Am. Rep., 645

In Rison *v.* Farr, 24 Ark., 168, Hon. Liberty Bartlett, circuit judge, says:

> "By a course of judicial decisions reaching from the earliest history of American Government to the present day, without a dissenting voice it has been adjudged that courts of justice have the right, and are in duty bound, to test every law by the Constitution, as the fundamental and paramount law of the land, governing all derivative power and the exercise thereof. The judicial department with us is the proper power, under the Constitution, to declare the constitutionality of a law, and every act of the legislature contrary to the true intent and meaning of the Constitution, will be declared by the courts null and void, and of no effect whatever.
>
> "To contend that this is not so would be to assert, that the legislative branch of the Government is supreme in its authority; that the creature is mightier than the creator; that the agent has greater power than his principal, who commissioned him and sent him out to transact business under a written authority; that the one co-ordinate and concurrent branch or department of the Government, subordinate to the Constitution is absolute over the departments, and can control, according to its will and pleasure, all others. It would be to assign limits to the legislative power by constitutional provisions, restraining the legislative body within certain bounds, and then to declare that, although it had passed beyond the limits assigned to its power, and violated the authority designed to govern it, yet that its action is valid and of binding force and obligation upon the other departments of Government, and has the effect to take away the very rights from the people which they have secured to themselves by constitutional provisions—a doctrine too monstrous to be for a moment entertained, and in every way dis-consonant to the fundamental principles and theories upon which our Government is based, and one which in practice would soon sweep away every vestige of the rights of the people, and reduce them to subjection to absolute power, or what would be worse, to a

state of anarchy and confusion, where life, property and every right would be left to the mercy of the legislative power."

Mr. Wells, in commenting on "Jurisdiction of Courts" (page 3, par. 6), says:

"Although statute law is often itself a source of jurisdiction, and a guide and limitation thereto, yet it is manifest it may pass under the exercise of jurisdiction as well as persons, and things disputed. This is the case when the question of the constitutionality of a law arises in a suit—a question, however, which can never arise where there is no written constitution, and the legislature is omnipotent, like the English Parliament. And so in a leading case, in 1803, the Supreme Court of the United States says: 'Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered by this court as one of the fundamental principles of our society. If an act of the legislature repugnant to the Constitution is void, does it notwithstanding its invalidity, bind the courts and oblige them to give it effect; or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall however, receive a more attentive consideration.

"'It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution. If both the law and the Constitution apply to a particular case, so that the courts must either decide that case conformably to the law, disregarding the Constitution, or

conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

"'If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes to the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our Government, is entirely void, is yet in practice completely obligatory. It would declare that if the legislature should do what is expressly forbidden, such acts, notwithstanding the express prohibition, are in reality effectual. It would be given to the legislature a practical and real omnipotence with the same breath which professes to restrict its powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.'" (Marbury *v.* Madison, 1 Cranch, 177.)

"It seems to be a necessary conclusion from the foregoing remarks, the power discussed being declared to be 'of the very essence of judicial duty,' that all courts of a higher or lower degree must possess authority to determine the question of constitutionality."

In Cooley's Constitutional Limitations, 7th edition, page 131, Mr. Cooley observes:

"The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed. 'The laws of a state,' observes Mr. Justice Story, 'are more usually understood to mean the rules and enactments promulgated by the legislative authority

thereof, or long-established local customs having the force of laws.' 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.' "And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. And in another case it is said: 'The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly, reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative.' "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."

"On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." * * *

(P. 232:) "The statute is assumed to be valid, until some one complains whose rights it invades. "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained" * * * (page 518).

"Even Congress, it has been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the courts. (Griffin *v.* Wilcox, 21 Ind., 370. Mr. Justice Perkins, construes statute

in regard to constitutional law: 'The act of Congress of March 3rd, 1863, assuming to indemnify officers for such arrest, is unconstitutional.')"

"And if the legislature cannot confiscate property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners" (Ames *v.* Port Huron Log-driving & Booming Co., 11 Mich., 139, 147).

Mr. Potter's Dwarris on Statutes and Constitutions, page 65, observes:

"It would be a task which no law writer would undertake, to define what are the precise limits within which a legislature, in its discretion, is limited, when they keep within their constitutional bounds. But every government should possess, and every constitutional government does possess, the means of protecting itself and its citizens, against encroachments, of even the legislative power, upon the other departments, and against violations of the fundamental law; and this means, is the judicial power." * * *

(Page 79:) "The principle as to the binding efficacy of statutes, does not prevail in the United States of America. There they hold, that as there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the Government, an act of the legislature may be void, as being against the Constitution (Kent Com.). The judicial department, say they, is the proper power in the Government to determine whether a statute, be or be not constitutional."

And furthermore the same author (page 351, n. 7), says:

"The Constitution of the United States is supreme over all the departments of government, and anything which may be done, unauthorized by it, is unlawful" (Dodge *v.* Woolsey, 18 How., 347). "It is supreme over the people of the United States, aggre-

gate, in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it (*ibid.*). The Government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit (McCulloch *v.* Maryland, 4 Wheat., 316). The Constitution was made for the benefit of every citizen of the United States—and there is no citizen, whatever his condition—or wherever he may be—within the territory of the United States, who has not a right to its protection" (United States *v.* More, 3 Cranch, 160).

In Broom's Legal Maxims, page 34, we find: "*Nova constitutio futuris formam imponere debet, non præteritis.*"

"A legislative enactment ought to be prospective, not retrospective, in its operation. Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective (note) in its operation, and opposed to sound principles of jurisprudence" (note). "Per Story, J., 2 Gallis (U. S.) R., 139. In the judgment of Kent, C. J., Dash *v.* Van Kleek, 7 Johns. (U. S.) R., 503, *et seq.*, the rule as to *nova constitutio* is fully considered, and various cases and authorities upon this subject are reviewed. (Page 506:) Puffendorf lays down, without any qualification, a general and pointed condemnation of all such laws; he says: 'A law can be revoked by the law-giver, but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. Suppose, for example, that there exists a law that the father of a family may dispose of his property by will, the legislature may, without doubt, restrain this unlimited right of disposing by will, but it would be unjust to take away the property acquired by will during the existence of the former law.'"

Mr. Sutherland in his "Notes on the United States Constitution," in considering the "treaty power of the United States," page 484, says:

> "So far as treaty provisions can become subjects of judicial cognizance in the courts, they are subject to such acts as Congress may pass for their enforcement, modification or repeal; but Congress cannot organize boards of revision to annul titles confirmed under a public treaty. (Reichart *v.* Felps, 6 Wall., 166; 18 L. Ed., 849.) The abrogation of a treaty cannot affect property rights already vested under it. Chirac *v.* Chirac, 2 Wheat., 277; 4 L. Ed., 234; Society for Propagation of Gospel *v.* New Haven, 8 Wheat, 494; 5 L. Ed., 662; The Chinese Exclusion Case, 130 U. S., 602; 9 S. Ct., 623; 32 L. Ed., 1068."

In Chirac *v.* Chirac, 2 Wheat., 277, Mr. Chief Justice Marshall said:

> "It will be admitted that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right."

In Sebastian Reichart- *v.* Felps, 6 Wall., 166, the Supreme Court of the United States held that—

> "Congress is bound to regard public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the Government."

In Wilson *v.* Wall, 6 Wall., 83, Mr. Justice Grier, in speaking for the court, said:

> "In all others of the numerous treaties made with the Indians (more of them made by Governor Cass than by any other person), where lands were reserved or agreed to be granted to any Indian, the name of the grantee and quantity to be given were carefully stated in the treaty."

"As this section of the treaty was capable of a different construction, Congress, on the 23rd of August, 1842, in order to save something for the children from the folly or incapacity of the parent, appointed commissioners with full power to examine and ascertain the names of the parties who had fulfilled the conditions of settlement to entitle them to patents for their land, and ascertain the quantity for each child, 'according to the limitations contained in said article.'"

"Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the Department, it cannot affect titles before given by the Government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals."

Rights of persons and property, not political rights, are subjects of judicial power.

Brown on Jurisdiction, 2d edition, page 86.

Mr. Black, in his Commentaries on "Constitutional Law," page 50, section 21, observes:

"The judicial department of the Government is the final and authoritative interpreter of the Constitution. There is a sense in which every person, even a private individual, must judge of the meaning and effect of the Constitution, in order to govern his own actions and his dealings with other men. And the executive and legislative departments of government are clearly under the necessity of making similar determinations, at least in advance of authoritative expositions by the courts. But as the Constitution is a law, and questions concerning its scope and interpretation, and of the conformity of public and private acts to its behests, are questions of law, the ultimate determination of such questions must belong to the department which is charged with the function of ascertaining and applying the law.

And as the courts have the power to enforce their judgments, their determination of such questions is final. And as their decisions are entitled to respect and obedience as precedents, their expositions of the Constitution are authoritative."

Section 22:

"It is the right and duty of the courts to examine the constitutional validity of every statute brought fairly before them as applicable to a pending controversy; and if they find such statute to be in contravention of the Constitution, they may and must pronounce it a nullity and no law." (Van Horne's Lessee *v.* Dorrance, 2 Dall., 304.)

"It is the business of the judicial department of government to interpret and apply the law to cases brought before them. In so doing, they must determine what is the law applicable to a particular case. A statute which, if valid, will govern the case, is presumptively the law for its decision. But a statute is the expressed will of the legislature, while the Constitution is the expressed will of the people. The latter is paramount. If the statute conflicts with it, it is invalid; it is no law. Now when this question of unconstitutional legislative action is raised, in such a manner as to become necessary to the determination of the pending cause, the court must decide it. And if it shall find that the statute is in violation of the Constitution, and therefore no law, it must so declare and decide the case accordingly. This is the whole rationale of the power of the courts to adjudge statutes invalid. It is not a veto power. It is not a supervisory power over legislation. It is simply the power to ascertain and decide what is the law for the determination of the cause which happens to be before the court." Griffin *v.* Cunningham, 20 Grattan, 31 (Va.).

Mr. Brown, in his comments on the "Jurisdiction of Courts" (2d edition, page 6), observes:

"The Supreme Court of the United States has very succinctly defined jurisdiction in the following words: 'The power to hear and determine a cause is jurisdic-

> tion; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that, on demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of the petition containing all the requisites, and in the manner prescribed by law.' United States *v.* Arredondo, 6 Peters, 709."

(NOTE.—The question of jurisdiction does not depend upon the truth or falsehood of the charge, but the nature of it; it is determinable on the commencement and not at the conclusion of the inquiry.)

And the same author, in observing "Constitutional Immunities," page 65, citing Dartmouth College *v.* Woodward, 4 Wheat., 519, says:

> "Among the many jurisdictional requirements that are required by law, none are more important than the limits and restrictions that the Constitution places upon all departments of the Government. It is the organic law of the United States and must be observed by every department—executive, legislative and judicial—and will permit no violations of its provisions. First, all State constitutions must conform to the Constitution or organic laws of the United States."

(NOTE.—Mr. Webster in the case of Dartmouth College *v.* Woodward, *supra*, said:

> "By the law of the land is most clearly intended the general law; a law that hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of

> attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's property to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land." Cooley's Const. Lim., 33; Cummings *v.* Missouri, 4 Wall., 277; State *v.* Keith, 63 N. C., 140.)
>
> "Any law of any legislature, State or national, must not be repugnant to the National Constitution. The judgment of every court must implicitly obey and follow its provisions and conform to due process of law."

Mr. Charles Henry Butler, in his comments on the "Treaty-Making Power of the United States," vol. II, page 145, states:

> "In fact the judiciary is the only department of the Government which can construe a treaty or a statute."

The same author, page 131, cites, The Society for the Propagation of the Gospel in Foreign Parts *v.* The Town of New Haven, and William Wheeler, U. S. Sup. Ct., 1823, 8 Wheat., 464, in which Mr. Justice Washington held that the termination of a treaty does not divest rights of property already vested under it; and, that

> "The proper courts in this country will interfere to prevent an abuse of the trusts confided to British corporations holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts; but neither those courts, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property."

U. S. R. S., 629; Federal Stat., annotated, volume IV, page 281:

> "The circuit court has jurisdiction of suits against the agent or officer of a State, and suits in which the State is interested, but not a party." Swasey *v.* Rail-

road Co., 1 Hughes, 19; Charles River Bridge *v.* Warren Bridge, 11 Pet., 572; McComb *v.* Liquidation Board, 2 Woods, 54; 92 U. S., 531; Preston *v.* Walsh, 10 Fed. Rep., 325; Davis *v.* Gray, 16 Wall., 203; Gray *v.* Davis, 1 Woods, 425; Woolsey *v.* Dodge, 6 McLean, 145; 18 How., 331; United States *v.* Peters, 5 Cranch, 115.

IV.

The said circuit court, in making, rendering and entering a decree adjudging want of jurisdiction upon said bill of complaint, erred because the said case arises under the Constitution and laws of the United States and a treaty made under their authority, and upon the further ground that the court of chancery has jurisdiction of charitable uses, independent of the Statute of 43 Elizabeth, chapter 4. Tiedeman on Real Property, sec. 884, page 906, and cases cited.

In "Jurisdiction of Federal Courts," in respect to the "jurisdiction of circuit courts" (pages 8 and 9), Mr. Carter observes:

> "The original judiciary act of September 24, 1789, remained in force, with scarcely any modification, until the act of March 3, 1875. This latter statute greatly enlarged the jurisdiction of the circuit courts, both original and by removal, and, as amended by the act of March 3, 1887 (corrected by the act of August 13, 1888, passed to cure defects in the enrollment of the act of March 3, 1887), constitutes the principal statutory regulation governing these courts. Among its provisions are the following:
>
> "'(*Circuit Courts.*) The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; and
>
> "'(*Federal Question.*) Arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority.'"

Desty's Federal Procedure, 9th edition, volume I, page 365, states:

> "A suit involving the constitutionality of certain acts of Congress involves a Federal question" (Parsons *v.* District of Columbia, 170 U. S., 45).

The same author, *supra*, page 3, observes:

> "The judicial power of the United States is vested, by the Constitution, in the courts of the United States" (Thomas *v.* Loney, 134 U. S., 372). * * * (Page 4:)
>
> "Judicial power is never exercised for the purpose of giving effect to the will of the judge, but always of the will of the legislature, or of the law (Osborn *v.* Bank of United States, 9 Wheat., 818), and must regard the Constitution as paramount" (Marbury *v.* Madison, 1 Cranch, 137; Cohens *v.* Virginia, 6 Wheat., 414).

Mr. Chief Justice Marshall, in Osborn *v.* Bank of U. S., *supra*, page 818, speaking for the court, says:

> "The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the Constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole executive power in the President; and the third article declares, 'that the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority.'
>
> "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form

that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

(Page 870:)

"The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion, and examine the title."

In Marbury *v.* Madison, 1 Cranch, 137, the Supreme Court of the United States held—

"That an act of Congress repugnant to the Constitution cannot become a law."

And that—

"The courts of the United States are bound to take notice of the Constitution."

In Principles of Constitutional Law, page 31, Mr. Cooley observes:

"By Article VI it is declared that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, anything in the constitution and laws of any State to the

contrary notwithstanding.' Upon this is to be observed—

"1. The Congress of the United States derives its power to legislate from the Constitution, which is the measure of its authority; and any enactment of Congress which is opposed to its provisions, or not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one." Ableman *v.* Booth, 21 How., 506, 520; United States *v.* Cruikshank, 92 U. S., 542; United States *v.* Harris, 106 U. S., 629; Civil Rights Cases, 109 U. S., 3.

In Ableman *v.* Booth, 21 How., 519, 520, Mr. Chief Justice Taney, in delivering the opinion of the court, said:

"The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that 'this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land and obligatory upon the judges in every State.' The words in italics show the precision and foresight which mark every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

"The Constitution has accordingly provided as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under 'this Constitution' and the laws of the United States—

leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution."

And in this case last cited the Supreme Court of the United States held that—

"This court has judicial power over all cases in law and equity arising under the Constitution and laws of the United States, and in such cases, as well as others enumerated, has appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make."

Mr. Henry Campbell Black, on "Constitutional Law" (Hornbook series), section 72, page 118, observes:

"The Constitution declares that the judicial power of the United States shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or citizen thereof, and foreign States, citizens, or subjects.

"The judicial department of the Federal Government is invested, by this clause, with powers which are even more extensive than those of the legislative or executive branch. It is clothed with jurisdiction over all controversies which may involve the interpretation of the National Constitution or the enforcement of national laws and treaties, thus, securing, so far as it rests with the courts, the supremacy of the central government within its proper sphere. And it possesses jurisdiction in all those classes of cases where the intervention of the Federal

judiciary is necessary or appropriate to insure the peaceful and harmonious relations of the States with each other, and to maintain the rights of citizens of the several States. But besides this it is intrusted with the determination of controversies which do not involve the maintenance or application of Federal law, but which are best placed within the control of the Federal judiciary, because otherwise State interests or local prejudice or jealousies might well be expected to interfere with the due administration of justice. Attention should be paid to the words in which this grant of power is expressed. It is extended to all 'cases' of a particular character. Before there can be any proper exercise of the judicial power a 'case' must be presented in court for its action. A case implies parties, an assertion of rights, or a wrong to be remedied. It extends to all cases in law or equity. And it is held that with the exception of admiralty, all modes of procedure for the assertion of rights must be arranged under one class or the other, either law or equity. Hence, the terms used include criminal cases, arising under the Constitution or laws, as well as civil issues. It will be perceived, in general, that the cases to which the judicial power extends may be arranged in two classes. The first includes all cases arising under the Constitution or laws or treaties. And here it is the character of the suit which gives jurisdiction, without reference to the character of the parties."

Mr. Cooley, in observing the "Principles of Constitutional Law," page 126, says:

"A case may be said to arise under the Constitution, or under a law or treaty, when a power conferred or supposed to be, a right claimed, a privilege granted, a protection secured, or a prohibition contained therein, is in question (Story on Const., sec. 1647). It matters not whether the party immediately concerned be the United States, in its sovereign capacity, asserting one of its most important powers, or a State defending what it believes to be its own reserved jurisdiction, or a humble citizen contending for a trivial interest; if the case turns wholly or in part

> on the interpretation or application of the Constitution, the validity or construction of an enactment of Congress, the force or extent of a treaty, the justification of any act of a Federal officer or agent by the Federal authority under which he assumes to act, or the validity of any State enactment, or any act under supposed State authority, which is disputed as an encroachment upon Federal jurisdiction, or as being expressly or by implication forbidden by the Federal Constitution,—in each instance the case is fairly within the intent of the provision under consideration, and within its reason and necessity." Tennessee *v.* Davis, 100 U. S., 257.

In Tennessee *v.* Davis, *supra*, the Supreme Court of the United States held, that—

> "The judicial power of the United States by the express words of the Constitution, extends 'to *all* cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority.'"
>
> "That provision embraces alike civil and criminal cases arising under the Constitution and Laws of the United States." (Cohen *v.* Virginia, 6 Wheat., 399). Both are equally within the domain of the judicial power of the United States."
>
> "A case arises under the Constitution of the United States, not merely where a party comes into court to demand something conferred upon him by the Constitution or by law or treaty, but whenever its correct decision as to the rights or defense of either party depends upon the construction of either. It is in the power of Congress to give the circuit courts of the United States jurisdiction of such a case, although other questions of fact or of law may be involved in it."

And in Tennessee *v.* Davis, last cited, Mr. Justice Strong, in delivering the opinion of the court, said

> "By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper

for carrying into execution, not only all the powers previously specified, but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the second section of the third article to 'extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, etc.' This provision embraces alike civil and criminal cases arising under the Constitution and laws." Cohens *v.* Virginia, 6 Wheat., 399. "Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const., sec. 1647; Cohens *v.* Virginia, 6 Wheat., 379."

Mr. Cooley, in his comments on "Constitutional Limitations," page 29, states that the courts of the Union have jurisdiction "where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege,

or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority."

Mr. Lane observes (Note 1, Acts 1789 and 1867, R. S. 1878, title 13, ch. 14):

> "It is settled law, as established by well-considered decisions of this court pronounced upon full argument, and after mature deliberation, notably in Cohens *v.* Virginia, 6 Wheat., 264; Osborn *v.* Bank of United States, 9 Wheat., 738; Mayor *v.* Cooper, 6 Wall., 247; Goldwater & Washing Co. *v.* Keyes, 96 U. S., 199; and Tennessee *v.* Davis, 100 U. S., 251:
>
> "That while the eleventh amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State.
>
> "That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends upon a construction of either.
>
> "That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party in whole or in part, by whom they are asserted.
>
> "That except in the cases of which this court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both as the wisdom of Congress may direct; and lastly,
>
> "That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the Constitution or laws of the United States; but

when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it." Harlan, J., in New Orleans, Mobile & Texas Railroad Co. *v.* Mississippi, 102 U. S., 135, 140.

"A case arising out of a violation of the contract clause of the Constitution, is a case arising under the laws of the United States and properly in the jurisdiction of these courts." Sawyer *v.* Parish of Concordia, 12 Fed. Rep., 754; Keith *v.* Rockingham, 18 Blatchf., 246.

In Sawyer *v.* Concordia, 12 Fed. R., 754 (C. C. W. D. Louisiana, June, 1882), the court held, respecting jurisdiction—Federal question, that—

"When there is a Federal question involved in the suit, the circuit court has jurisdiction, under act of March 3, 1875, without regard to the citizenship of the parties."

"*Jurisdiction—On what depends:* 'The jurisdiction of the latter cannot be vested or divested by the character of the defense made, but depends upon the issues raised by plaintiff's petition, and necessary to be determined to afford him adequate remedy.'"

And in the case last cited, page 760, note—Federal questions:

"Where there is a Federal question involved, the circuit court has jurisdiction without regard to the citizenship of the parties. Wilder *v.* Union National Bank, 12 Chi. Leg. News., 75, see Wiggins' Ferry Co. *v.* Chicago & A. R. R. Co., 11 Fed. Rep., 384; Green *v.* Klinger, 10 Fed. Rep., 692, and note. The United States court is the final arbiter of constitutional construction, and Congress may invest it with the power to construe any constitutional law. (Van Horne *v.* Dorrance, 2 Dall., 304; Cohens *v.* Virginia, 6 Wheat., 264; Ableman *v.* Booth, 21 How., 506; S. C. 3, Wis. 1; The Mayor *v.* Cooper, 6 Wall., 247); but for its

power to extend to a constitutional question it must be in a case at law or in equity (Cohens *v.* Virginia, 6 Wheat., 264). The power of the United States court extends over statutes, whether passed by a State legislature or by Congress, which are claimed to be in contravention of the Constitution of the United States."

In Kent (14 ed.), vol I., page 322, note (*b*), the writer says:

> "In the case of Kendall *v.* The United States, 12 Peters, 524, it was decided that the Circuit Court for the District of Columbia had authority to issue and enforce obedience to a mandamus requiring the performance of a mere ministerial act by the Postmaster-General, and which he nor the President had any authority to deny or control; for the Postmaster-General is not subject to the direction and control of the President, with respect to the execution of duties imposed upon him by law."

NOTE 1. Mandamus.—See besides the cases cited in note (*b*), *Ex parte* De Groot, 6 Wall., 497. A ministerial duty the performance of which may be enforced by mandamus or injunction, is one in respect to which nothing is left to discretion. "It is a simple, definite duty, arising under circumstances admitted or proved to exist, and imposed by law." Mississippi *v.* Johnson, 4 Wall., 475, 498, stated *post*, 323, note 1. Davis *v.* Gray, 16 Wall., 203; United States *v.* Lee, 106 U. S., 196.

> (Page 328.) "Jurisdiction was given to the courts of the Union in two classes of cases. In the first, their jurisdiction depended on the character of the cause, whoever might be the parties; and, in the second, it depended entirely on the character of the parties, and it was unimportant what might be the subject of controversy. The general government, though limited as to its objects, was supreme with respect to those objects. It was supreme in all cases in which it was empowered to act. A case arising under the Constitution and laws of the Union was cognizable in the

courts of the Union, whoever might be the parties to that case. The sovereignty of the States was limited or surrendered, in many cases, where there was no other power conferred on Congress than a constructive power to maintain the principles established in the Constitution. One of the instruments by which that duty might be peacefully performed was the judicial department. It was authorized to decide *all cases* of every description, arising under the Constitution, laws, and treaties of the Union; and from this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. It was likewise a political axiom, that the judicial power of every well-constituted government must be coextensive with the legislative power, and must be capable of deciding every judicial question which grows out of the Constitution and laws." United States *v.* Arredondo, 6 Peters, 691, 709.

In the case of the United States *v.* Arredondo *et al.*, page 738, Mr. Justice Baldwin, in delivering the opinion of the court, said:

"The stipulations of the treaty, the acts of Congress, and the laws of Spain, and on such testimony as may be admissible by the rules of evidence and principles of law. Applying, then, these tests to the eighth article, and to ascertain its legal meaning when the contracting parties understand it differently, we consider it as in its effect and legal operation an exception and reservation of the lands so granted from the territory ceded to the United States. If the title was confirmed presently, the King had within the bounds of the grant no right or title to convey, and the United States could receive none. If no future act of theirs was necessary to their ratification and confirmation, the legal estate, much less the beneficial interest, never passed to them. A treaty of cession is a deed of the ceded territory, the sovereign is the grantor, the act is his, so far as it relates to the cession, the treaty is his act and deed, and all courts must so consider it, and deeds are construed in equity by the rules of law.

"A government is never presumed to grant the same land twice (7 J. R., 8). Thus a grant, even by act of Parliament, which conveys a title good against the King, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land (8 Co., 274, b; 1 Vent., 176; 2 J. R., 263). If land is granted by a State, its legislative power is incompetent to annul the grant, and grant the land to another; such law is void." (Fletcher *v.* Peck, 6 Cranch, 87, etc.)

Mr. John D. Works, in his remarks on "Courts and Their Jurisdiction," page 430 (note), states:

"In Osborn *v.* United States, 9 Wheat., 819, the Supreme Court of the United States, speaking by Chief Justice Marshall, after quoting the third article of the Constitution declaring the extent of the judicial power of the United States, said:

"'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'"

"In his Commentaries on the Constitution, Mr. Justice Story says: 'It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. *When it has assumed such a form, it then becomes a case;* and *then, and not till then, the judicial power attaches to it.* A case then, in the sense of this clause of the Constitution, arises when some subject touching the

> Constitution, laws, or treaties, of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.'"

In Western Union Tele. Co. *v.* Andrews *et al.*, 154 Fed. Rep., 95, decided June 22, 1907, District Judge Trieber held that—

> "A suit is maintainable in the Federal courts against a State officer claiming under an unconstitutional State statute, where he holds possession or is about to take possession or commit a trespass on property belonging to or in plaintiff's possession."
>
> "The exemption of a State from judicial process does not protect its officers and agents from personal liability in an action of tort by a private person whose rights of property have been wrongfully invaded or injured by the authority of the State; and in case the remedy at law is inadequate the officers may be restrained by injunction from doing positive acts for which they would be personally liable for taking or injuring plaintiff's property in violation of the Constitution and laws of the United States."
>
> (ED. NOTE.—For cases in point, see Cent. Dig., vol. 13, Courts, section 844½.)

And in *Ex parte* Edward T. Young, petitioner, 209 U. S., 123, decided March 23, 1908, in the Supreme Court of the United States, Mr. Justice Peckham, delivering the opinion of the court (page 144) said:

> "Jurisdiction is given to the circuit court in suits involving the requisite amount, arising under the Constitution or laws of the United States (18 Stat. at L., 470, chap. 137, U. S. Comp. Stat., 1901, p. 508), and the question really to be determined under this objection is whether the acts of the legislature and orders of the railroad commission, if enforced, would take property without due process of law; and although that question might incidentally involve a question of fact, its solution nevertheless is one which raises a Federal question. See Hastings *v.* Ames

(C. C. App., 8th C.): 15 C. C. A., 628; 32 U. S. App., 485; 68 Fed., 726." * * *

(Page 145:) "We conclude that the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States."

Mr. Sutherland in his "Notes on the United States Constitution," in discussing "Treaty power," page 481, says:

"A treaty is in a nature of a contract between two nations, to be carried into execution by the sovereign power of the respective parties (Foster *v.* Neilson, 2 Pet., 314; 7 L. Ed., 415; Goetze *v.* United States, 103 Fed. R., 72); but while a treaty is a contract, in the United States it is like an act of Congress, in that the courts must take judicial notice of it (United States *v.* Ransleher, 119 U. S., 418; 7 S. Ct., 234; 30 L. Ed., 425). A treaty is the supreme law of the land, and where self-operative is equivalent to an act of the legislature, and forms a rule of decision in all courts (Strother *v.* Lucas, 12 Pet., 439; 9 L. Ed., 1137). The courts of justice must interpret and administer a treaty according to its terms, and they cannot annul or disregard any of its terms; they must obey its mandates even though litigation already in court is affected and reversal of a judgment below becomes necessary (United States *v.* Schooner Peggy, 1 Cranch, 109; 2 L. Ed., 49; Martin *v.* Hunter, 1 Wheat., 370; 4 L. Ed., 97)."

Century Digest, volume 13, "Courts," section 840. Cases arising under Treaties (U. S., 1809)

"Under the provision in the Constitution that judicial power shall extend to all cases arising under treaties made or to be made under the authority of the United States, if a defendant in ejectment set up an outstanding title in a British subject, which he contends is protected by the treaty of 1794, and that the title is therefore out of the plaintiff, this is not a case arising under the treaty."

But on the other hand:

> "If the British subject, in whom the outstanding title, protected by the treaty, was supposed to have vested, or his heirs, had claimed the land, it would have been a case under the treaty." Owings *v.* Norwood, 9 U. S. (5 Cranch), 344; 3 L. Ed., 120.

Federal Statutes Annotated, volume 9, page 34, states that "Congress is without authority to nullify titles confirmed by treaty."

> "Congress is bound to regard the public treaties, and it has no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the Government." Reichart *v.* Felps (1867), 6 Wall. (U. S.), 165.

And furthermore, in United States *v.* Reese (1879), 5 Dill. (U. S.), 405; 27 Federal case, No. 16137, the Court held, that "Congress has no constitutional right to interfere with rights under treaties, except in cases purely political." Holden *v.* Joy, 17 Wall. (84 U. S., 247; Wilson *v.* Wall, 6 Wall. (73 U. S.), 89; Insurance Co. *v.* Carter, 1 Peters (26 U. S.), 542; Doe *v.* Wilson, 23 How. (64 U. S.), 461; Mitchell *v.* U. S., 9 Pet. (34 U. S.), 749; The Kansas Indians, 5 Wall. (72 U. S.), 737; 2 Story, Const., section 1508; Foster *v.* Neilson, 2 Pet. (27 U. S.), 254; Crews *v.* Burcham, 1 Black (66 U. S.), 356; Worcester *v.* Georgia 6 Pet. (31 U. S.), 562; Blair *v.* Pathkiller's Lessee, 2 Yerg., 407; Harris *v.* Barnett, 4 Blackf., 369.

In Headmoney cases, 112 U. S. Rep., 598, the court said

> "A treaty then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

Bouvier's Law Dictionary, vol. I, page 311, defines: "Charitable Uses—Charities."

> "Gifts to general public uses, which may extend to the rich as well as the poor." Camden, Ld. Ch., in Ambler's Reports, 651, vol. 2; adopted by Kent, Ch., 7, Johns., Ch., 294; Lyndhurst, Ld. Ch., in 1 Ph. Ch., 191; and U. S. Supreme Court, in 24 How., 506; Bisp. Eq., sec. 124; 2 Sneed, 305.
>
> "Gifts to such purposes are enumerated in the act of 43 Elizabeth, chapter 4, or which, by analogy, are deemed within its spirit or intendment. Boyles Char., 17."
>
> "Such a gift was defined by Mr. Binney to be 'whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish.' Vidal *v.* Girard's Ex'rs, 2 How., 128; approved by the Supreme Court of Pennsylvania in 28 Pa., 35, and the Supreme Court of the United States in 95 U. S., 311."

And the same author, *supra*, page 301, observes that

> "It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the Statute. Perry on Trusts, 694, vol. 2; Stuart *v.* Easton, 74 Fed. Rep., 854."

In his comments on "Constitutional Legislation," page 627, Mr. John Ordronaux defines,

> "Charitable Uses" means popularly gifts for the relief of the poor. In law it signifies any gifts to public uses dependent solely upon the will of the donor." Drury *et al. v.* Inhabitants of Natick, 10 Allen (Mass.), 169, in which (page 182) Judge Gray says: "The town in April, 1863, at a meeting duly called for the purpose, voted to accept and receive this gift, and chose trustees to take charge of it according to the will. Upon such acceptance, the power to renounce the gift ceased, and the estate could not pass

from the town without a conveyance in due form of law.'

"Besides, the gift being for a charitable purpose, and once accepted, could not afterward be renounced and conveyed away, so as to defeat the charity." American Academy *v.* Harvard College, 12 Gray, 551, 582; Harvard College *v.* Society for Theological Education, 3 Gray, 280; Attorney General *v.* Christ's Hospital, 1 Russ. & Myl., 626; S. C. Tamlyn, 393; Attorney General *v.* Caius College, 2 Keen, 163.

"A dedication to pious and charitable uses may be effectual, though not distinctively a public one; and, if so made that the holder of the estate becomes a trustee for the purposes of a charity, no subsequent conveyance to one having notice could change the use. * * *

"To effect such a dedication, there must be a donation by the owner, or some unequivocal act united with an intent to divest himself, to some extent, of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body. No one but the owner of land in fee can dedicate it, or the use of it, to the public. And it is, moreover, essential to a dedication that the owner should intend what he does as a dedication, and this must be found affirmatively by the jury to constitute it such. The law considers such a state of things in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication; for this would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." Washburn on Real Property, vol. 3 (6th Ed.), 79.

Mr. Justice Story, in his Commentaries on "Equity Jurisprudence," volume 2 (12 Ed.), chapter 32, section 1171*a*, in speaking of "Dedication of lands to charitable use," cites McLain *v.* School Directors, 51 Penn St., 196, in which it was held that "equity will enforce the dedication." And states that "Charities cannot be altered after death of donor"

(section 1175); and "will not be diverted from original purposes" (section 1176).

The same author, *supra*, furthermore observes:

> "The general rule is, that, if lands are given to a corporation for any charitable uses, which the donor contemplates to last forever, the heir never can have the land back again" (section 1177).

In Good *v.* McPherson, 51 Mo., 126, the Supreme Court of Missouri, held that "Donations to charitable uses—cannot be recalled." Judge Adams, who delivered the opinion of the court, said:

> "Where property has thus been donated to charitable uses, neither the donor himself, nor his heirs can ever reclaim it."

Pingrey on Real Property, volume 2, page 1083, section 1057, in respect to

> "Revocation—A completed trust without reservation of power of revocation can only be revoked by the consent of *all* the beneficiaries and other parties; if any of the parties are not in being, or are not *sui juris*, it cannot be revoked at all." Ewing *v.* Shannahan, 113 Mo., 188; Kopp *v.* Gunther, 95 Cal., 63; Reidy *v.* Small, 154 Pa. St., 505; Keys *v.* Carleton, 141 Mass., 45; Locke *v.* Barbour, 62 Ind., 585; North *v.* Philbrook, 34 Me., 537; Neilson *v.* Lagow, 12 How. (U. S.), 106; Gould *v.* Lamb, 11 Met. (Mass.), 84; Morgan *v.* Moore, 3 Gray (Mass.), 319; Cleveland *v.* Hallett, 6 Cush. (Mass.), 403; Farquharson *v.* Eichelberger, 15 Md., 63; Hildreth *v.* Eliot, 8 Pick. (Mass.), 296; Bowman *v.* Long, 89 Ill., 19; Wright *v.* Moody, 116 Ind., 179; Isham *v.* Delaware, 11 N. J. Eq., 227; Gaylord *v.* Lafayette, 115 Ind., 429.
>
> "Property unconditionally dedicated to public use, or to a particular use, does not revert to the original owner except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstruction removed." 2 Dillon

on Municipal Corporations (4th ed.), Sec. 653, and cases cited. (Curran *v.* Louisville, 83 Ky., 628.)

Volume 2, Beach on Injunction, page 1154, section 1149:

"Burial place trespasser." "The heirs of a decedent at whose grave a monument has been erected or the person who rightfully erected it, is entitled to an injunction to restrain one who, without right, threatens to injure or remove it, although the title to the ground is in another. * * *

"Where the owner of land has dedicated it to the public for burial purposes, his grantee may be enjoined from defacing and meddling with graves on the land at the suit of persons who have deceased relatives buried there. And two such persons can maintain a bill for such injunction as well as if all others directly interested had joined with them." Davidson *v.* Reed, 111 Ill., 167; And see Beatty *v.* Kurtz, 2 Peters, 566; Trustees *v.* Walsh, 57 Ill., 363; Smith *v.* Bangs, 15 Ill., 399; Mooney *v.* Coolidge, 30 Ark., 640—Dedication of grounds for burial purposes — Whether established. "Where the owner of a quarter section of land as early as 1844 buried a child in a corner thereof, since which time the same has always been used by the people of the neighborhood as a public burying place, and the declarations of such owners showed an intent to devote the land to such use, and subsequent owners of the quarter section of land made no objection to such use, but recognized the same as a public burial place, it was *held*, that these facts were sufficient to show a dedication of the land so used, to the public for a place for the interment of the dead." Davidson *v.* Reed *et al.*, 111 Ill., 168.

In The City of Cincinnati *v.* The Lessee of White, 6 Pet., 431, Mr. Justice Thompson, speaking for the court, said:

"Dedications of land for public purposes have frequently come under the consideration of this court, and the objections which have been raised against their validity have been the want of a grantee competent to take the title; applying to them the same rule which prevails in private grants, that there must

> be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication.
>
> "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land and the fact of its being used for the public purposes intended by the appropriation."

The above case (City of Cincinnati *v.* Lessee of White), is an important and leading case, and the doctrine laid down in it is well settled, and has been followed in other cases. Barclay *et al. v.* Howell's Lessee, 6 Peters, 498, 507 (1832); New Orleans *v.* United States, 10 Pet., 662, 713; 1 Abb. Not. Dig. Cases criticised, p. XXIX.

> "No certain period of time is requisite to establish a dedication. It does not depend upon the lapse of time, but upon the intention of the parties; and this, it seems, may be established by acts, unequivocal in their character, on the part of the owner and the public, though occurring on a single day." Hunter *v.* Trustees of Sandy Hill, 6 Hill (N. Y.), 407; Irwin *v.* Dixon, 9 How., 10; Ward *v.* Davis, 3 Sandf., 502.

In Hunter *v.* Trustees of Sandy Hill, *supra*, decided in the Supreme Court of New York, the opinion of Judge Beardsley, p. 417, states:

> "This being a case to which the law of dedication applies, the use for which the dedication was made must determine the extent of the right parted with by the owner of the land, and acquired by the public. (Cincinnati *v.* Lessee of White, 6 Pet. Rep., 138.) Where, as in the case of a highway, the public acquire but a mere right of passage, the owner who makes the dedication retains a right to use the land in any way compatible with the full enjoyment of the public

easement. But the case is widely different here. The land in question was dedicated as a grave yard, and the ashes of the dead should be allowed to repose in undisturbed solitude and quiet. The grave is hallowed. This sentiment is deeply seated in the human heart, and is all but universal. It exists with scarcely less intensity of strength in the breast of the savage, than in that of civilized man, repelling every rude approach to the resting place of the dead, and forbidding as sacrilegious, its use for any of the secular and common purposes of life.

"A dedication once made cannot be recalled and the intention of the owner, at the time is to be considered—not their intention at any subsequent time." Ruch *v.* City of Rock Island, 5 Biss., 95; Adams *v.* Saratoga R. R. Co., 11 Barb., 414.

Current Law, volume 3, page 666 (note 53):

"Equity will enjoin the owner of land from defacing or meddling with graves on land dedicated to the public for burial purposes at the suit of any person having deceased relatives or friends buried therein." Wormley *v.* Wormley, 207 Ill., 411, 69 N. E. Rep., 865, decided in the Supreme Court of Illinois, February 17, 1904, in which, after stating facts, Judge Magrauder said:

"'It is well settled in the United States that cemeteries are among the purposes for which land may be dedicated, and it is held that, upon such dedication, the owner is precluded from exercising his former rights over the land.' 5 Am. & Eng. Ency. of Law (2nd Ed.), page 784, and cases referred to in notes.

"It is also well settled that a court of equity will enjoin the owner of land from defacing or meddling with graves on land dedicated to the public for burial purposes, at the suit of any party having deceased relatives or friends buried therein." Beatty *v.* Kurtz, 2 Pet., 585, 7 L. ed., 521; Davidson *v.* Reed, 111 Ill., 167, 53 Am. Rep., 613.

In the case of Beatty *v.* Kurtz, *supra*, the Supreme Court of the United States, in speaking of property consecrated to

cemetery purposes, held that "the removal of the memorials erected by piety or love to the memory of the good are such acts as cannot be 'redressed by the ordinary process of law.' The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

In Foster's Federal Practice, volume I (third edition), page 452, we find that—

> "Injunctions may be obtained to enforce a trust or other purely equitable right, to compel obedience to a covenant or other contract affecting land, to compel the obedience of corporations to their charters, to prevent a multiplicity of suits, generally to prevent an irreparable injury for which damages at law would be no adequate remedy, and also in cases in which they are expressly authorized by statute.
>
> "As trusts and other purely equitable rights are not recognized in courts of law, equity will always interfere to protect them by injunction when they are threatened with infringement." Scott *v.* Becher, 4 Price, 346; *In re* Chertsey Market, 6 Price, 261; Sloo *v.* Law, 3 Blatchf., 459; Draper *v.* Davis, 104 U. S., 347; Cowles *v.* Whitman, 10 Conn., 121; Bispham's Eq., 425; Kerr on Injunctions, 172, 173.

Century Digest, Courts, volume 13, sections 797, 798 (U. S., 1857):

> "The jurisdiction of the United States Courts extend to the enforcement of trusts in equity." Irvine *v.* Marshall, 61 U. S. (20 How.), 558; 15 L. Ed., 994.

Section 844 (U. S., 1882):

> "Circuit courts have no jurisdiction over a suit brought against a State, but they have jurisdiction in a suit brought by a proper person to enjoin a State officer from wasting, alienating, or destroying a trust

> estate, although the State may be the trustee and may remain silent." Preston *v.* Walsh (C. C.), 10 Fed. Rep., 315.

And in the words of an eminent author and jurist, Mr. Justice Black, as stated in "Constitutional Prohibitions," page 20, section 12:

> "Indeed, as remarked by Chief Justice Waite, 'the doctrines of the Dartmouth College case, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself.' (Stone *v.* Mississippi, 101 U. S., 814.) Another learned judge has said: 'All the cases are saturated with this doctrine. It is sustained, not by a current, but a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet anchor of our jurisprudence—can deny that it is immovably established.' "

V.

Whereas, the said appellant having shown to this Honorable Supreme Court of the United States, by the authorities and cases cited, that the said cause, in effect, is not a suit against the United States; and

That an act of Congress interfering with vested property rights of a citizen, to his irreparable loss and injury, without due process of law, is not the proper exercise of the legislative power, and is prohibited by the fifth amendment to the Constitution of the United States; and

That Congress has no constitutional right to interfere with property rights under treaties, and it has no power to nullify titles confirmed many years before by the authorized agents of the Government; and

That charitable uses, as required by the principles of equity and good conscience, are protected by the courts; and

That in each, and every instance, the circuit courts of the United States have jurisdiction to afford the relief sought:

Wherefore, the said appellant prays this honorable court to examine and correct errors assigned, herein, to the judgment and decree of the said Circuit Court of the United States for the District of Kansas; and

Further prays for a reversal of the order and decree of the said Circuit Court, adjudging want of jurisdiction, entered in the above-entitled cause.

LYDA B. CONLEY.

No. 77.

In the Supreme Court of the United States

October Term, 1909.

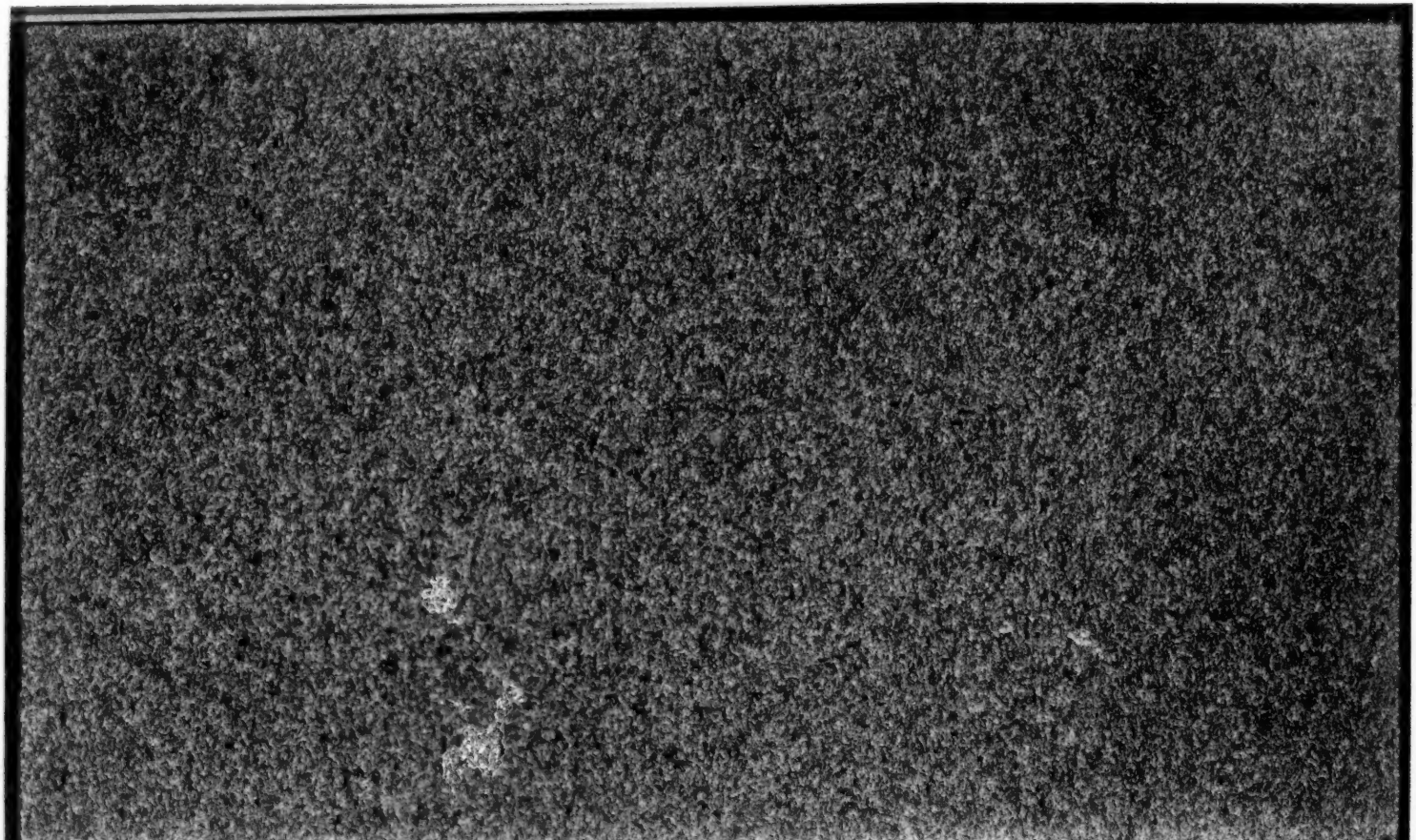
Lyda B. Conley, Appellant,

vs.

James R. Garfield, Secretary of the Interior, and Horace B. Durant, Thomas G. Walker, and William A. Harrison, Commissioners.

Appeal from the United States for the District of Kansas.

Brief for Appellee.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

LYDA B. CONLEY, APPELLANT,
v.
JAMES R. GARFIELD, SECRETARY OF THE Interior, and Horace B. Durant, Thomas G. Walker, and William A. Simpson, Commissioners. } No. 77.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLEES.

STATEMENT.

By a treaty concluded in 1829 (7 Stat., 327; 2 Kappler's Ind. L. & T., 217) the Government agreed with the Delaware Indians—

> * * * that the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River, to the Kansas line, and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide, north of the Kansas boundary line, for an outlet; shall be conveyed

> and forever secured by the United States, to the said Delaware Nation, as their permanent residence: And the United States hereby pledges the faith of the Government to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatever.

In 1843 the Delawares ceded their rights in a portion of this land to the Wyandotte *nation*. (9 Stat., 337; 2 Kappler's Ind. L. & T., 793.) The Wyandottes occupied the land so ceded until 1855, when it was decided that they were fit to abandon their tribal existence and be admitted to citizenship, and a treaty was accordingly concluded between them and this Government whereby they (the Wyandottes) did

> * * * cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, *the object of which cession is*, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty; except as follows, viz: The portion now enclosed and used as a public

> burying-ground, shall be permanently reserved and appropriated for that purpose * * * (10 Stat., 1159; 2 Kappler's Ind. L. & T., 506.)

It will be observed that the first-mentioned treaty, with the Delawares, did not purport to grant anything but a possessory right, and hence that such right is all that passed to the Wyandotte tribe by the treaty of 1843. Accordingly, the cession to the United States by the treaty of 1855 was a mere relinquishment of this tribal right of possession in order to clear the way for the contemplated allotment of the land to the individual members of the tribe.

The Wyandottes quickly proved themselves incompetent to manage their own affairs. Most of them speedily sold their allotments and dissipated the proceeds of such sales and became wholly dependent upon governmental bounty for their support. Therefore, in 1867, a treaty was made, reciting the dependent condition of the Wyandottes and setting aside a tract of land in the Indian country (which was ceded to the Government for that purpose by another tribe of Indians in the same treaty) for the use of those members of the Wyandotte tribe who had not become citizens of the United States and such others as had become such citizens and might desire to resume tribal life. (15 Stat., 513; 2 Kappler's Ind. L. & T., 740.) Nearly all the Wyandottes who had become citizens availed themselves of this privilege and resumed tribal life (Rep. of Secy. of Interior to 41st Cong., 2d sess., pp. 475, 903) and have since continued it.

This being the situation Congress, in the Indian p[illegible]opriation bill of 1906 (34 Stat., 325, 348), authorized the Secretary of the Interior to sell and convey the burial ground above mentioned and to remove the remains of those buried therein to the Wyandotte cemetery at Quindaro, Kans., and, after paying the expense of such removal, the cost of suitable monuments to those reinterred and the claims of certain Wyandotte Indians on a specified account, to distribute the proceeds of the sale ratably among the Wyandottes, parties to the treaty of 1855, or their heirs.

Appellant, who is a citizen of the United States, but of Wyandotte blood, objects to this sale on sentimental grounds (see allegation as to amount of money in controversy, R. 13), but seeks to base her right to object upon a supposed individual interest in the land vested in her by the treaty of 1855; and the sole question on the merits is as to the existence of this individual right. The case was dismissed by the court below, however, for want of jurisdiction; and although the appeal was general, bringing all questions here for review and consequently calling for a discussion of the merits, the jurisdictional objections appear fatal.

ARGUMENT.

I.

The lower court was without jurisdiction because the bill fails to show that the sum of two thousand dollars is involved.

The allegation of the amended bill is

> * * * that although the value of the land itself is the sum of seventy-five thousand dollars ($75,000.00) or more, that by reason of the aggrieved and wounded feelings of said orator there can be no standard by which to estimate the value of said seizin, legal estate, and vested rights as heir and beneficiary. (Record, p. 13.)

This is all that appears in respect to the amount involved in the controversy. It is of course wholly insufficient to show that the jurisdictional amount is involved. That amount is two thousand dollars. As a suit of this nature must be maintained under section 1 of the act of August 13, 1888 (25 Stat., 433), prescribing the jurisdiction of the Circuit Courts of the United States, which provides that such courts shall have original cognizance "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, * * * or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

The act of February 6, 1901 (31 Stat., 760), authorizing suits by Indian allottees in respect to their allotments, of course has no application to any case that does not involve the right of a person of Indian blood or descent to an allotment of land under some law or treaty. The appellant asserts no such right here.

II.

The lower court was without jurisdiction because the suit is in reality against the United States.

Whether or not appellant has any interest in the land, the legal title to it is indisputably in the United States. The fee has always been in the United States. The Wyandottes never had more than a mere right of possession. Even that right of possession was relinquished by the treaty of 1855. Further, even if the Wyandottes had a fee, that fee came to the United States under the treaty of 1855. Hence the only legal title is now in the United States. On the other hand, appellees have no interest whatever in the land or in the controversy. Accordingly, as to jurisdiction the case is ruled by *Naganab* v. *Hitchcock* (202 U. S., 473). In that case, as in this, the suit was brought by a citizen of the United States of Indian descent, and was based upon the alleged right of himself and other members of his tribe, in behalf of whom he sued, to have certain lands which had been conveyed by his tribe to the United States under an act of Congress of January 14, 1889, administered for their benefit. The allegation was that Hitchcock, the Secretary of the Interior, claiming to act under a

statute passed June 27, 1902, was about to do acts which, if carried out, would deprive said Indians of their property without compensation and without due process of law. This court said:

> It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the court of appeals, we are of opinion that there is no jurisdiction to entertain this case. In respect to this question it is on all fours with *State of Oregon* v. *Ethan Allen Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office*, decided on April 23 of this term (202 U. S., 60). That case was distinguished from *Minnesota* v. *Hitchcock* (185 U. S., 373), relied on here by the appellant, in the fact that in the *Minnesota* case the jurisdiction to sue the Secretary of the Interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation, and an acceptance by the Government of full responsibility for the

> result of the decision so far as the Indians were concerned (act of March 2, 1901, 31 Stat., 950). In this case, as in the *Oregon* case, the legal title to all the tracts of land in question is still in the Government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of Congress in anywise authorizing this action. Upon the authority of the *Oregon* case we hold that there is no jurisdiction to maintain the present suit, and the action of the court of appeals of the District of Columbia, affirming the decree of the Supreme Court of the District dismissing the complainant's bill, is affirmed.

The Oregon case referred to in the foregoing quotation (202 U. S., 60) was a suit to enjoin the Secretary of the Interior from allotting to individual Indians any part of the swamp lands situated within a described Indian reservation in the State of Oregon, because, as was alleged, the State had acquired title to such swamp lands by the swamp-land grant of March 12, 1860, although the Commissioner of the General Land Office, and on appeal the Secretary of the Interior, had rejected the State's claim to the land. The court, after showing by reference to the case of *Minnesota* v. *Hitchcock*, also referred to in the foregoing quotation, that the United States was the real party to the suit, said (p. 70):

> It is true in that case we sustained the jurisdiction of this court, but we did so by virtue of the act of March 2, 1901 (31 Stat.,

950), which was held to be a consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the Government of full responsibility for the result of the decision, so far as the Indians, its wards, were concerned. But neither of the two facts deemed essential to the maintenance of that suit appear in this. There is no act of Congress waiving immunity of the United States or consenting that it be sued in respect to swamp lands, either within or without an Indian reservation, and there is no act of Congress assuming full responsibility in behalf of its wards, the Indians, for the result of any suit affecting their rights in these lands. It is unnecessary to repeat all that was said in that opinion in reference to these matters. It is sufficient to refer to it for a full discussion of the question.

Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts

> may not anticipate its action or take upon themselves the administration of the land grants of the United States. (*New Orleans* v. *Paine*, 147 U. S., 261, 266; *Michigan Land & Lumber Company* v. *Rust*, 168 U. S., 589, 591; *United States* v. *Thomas*, 151 U. S., 577; *Brown* v. *Hitchcock*, 173 U. S., 473; *Humbird* v. *Avery*, 195 U. S., 480, 502, 503.)

A like decision was made in the case of *Louisiana* v. *Garfield* (211 U. S., 70), where the State also claimed title to swamp lands, while the Secretary of the Interior asserted that the title to the lands had not passed out of the Government, because at the time the swamp-land act was passed a military reservation existed which included the lands within its area. As to this claim the court held that the question could only be determined in a suit to which the United States was a party and that, not having consented thereto, the United States could not be sued in respect to the stated lands.

The distinction is obvious between a case of this sort, which involves land the title to which is actually vested in the United States, and those cases in which suits have been upheld against public officers attempting mere administrative action under unconstitutional statutes. In the latter cases no rights of the sovereign were involved, because the alleged rights were dependent for their existence upon statutes which, being unconstitutional, were nullities.

III.

It was not the purpose of the treaty of 1855 in reserving this land as a public burying ground to create in appellant or other members of the former Wyandotte tribe individual rights, legal or equitable, in the land. The United States took the land free at any rate from more than a mere moral obligation, which the act of June 21, 1906, amply meets.

1. Before the treaty of 1855 individual Wyandottes had no private rights in the land. The treaty of 1843 with the Delawares ceded the land to the "Wyandotte Nation." Such cession vested no title in the individual members of the tribe.

Fleming v. *McCurtain*, No. 253, this term.

The individual Wyandottes therefore gave the United States nothing on the cession. They even had no private rights in the cemetery while the tribe endured. Why, then, should it be supposed that it was intended in the treaty of 1855 to give these individual Wyandottes private proprietary rights which they had never before had?

2. Further, the treaty contemplated, beside the dissolution of the tribe, that its former members should become citizens of the United States. Why should they be given private rights in the cemetery in their new status?

3. The agreement concerning the cemetery was made with the Wyandotte tribe in view of its going out of existence. It was therefore at most a moral pledge to the dissolving tribe. Rights are not to be inferred from the treaty in favor of persons not par-

ties to it and themselves neither advancing any consideration nor assuming any individual obligations.

4. The reservation of the cemetery is fully explained by several purposes:

(*a*) Without it there would have been nothing to take the cemetery out of the operation of the general plan of allotment of the ceded lands.

(*b*) By the cession the Indian title was extinguished and consequently a reservation was necessary to prevent the land from becoming subject to entry under the general homestead laws, which have always provided that lands to which the Indian title has been extinguished shall be subject to entry and settlement unless reserved by some treaty, law, or proclamation of the President. (See act of Sept. 4, 1841, 5 Stat., 455; Rev. Stat., secs. 2257–2258.)

(*c*) As has been already suggested, the reservation was a pledge to the extinguished tribe that the Government would take decent care of the bodies of the deceased members of the tribe. This pledge is recognized and fully met by the provisions of the act of 1906. By that act the Secretary of the Interior is authorized—

> to provide for the removal of the remains of persons interred in said burial ground and their reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery.

Further than that, the sale is made for the benefit of the Indians and not for the benefit of the United

States. The act of 1906 provides that after paying the expense incurred in carrying out the above-quoted provision and after paying certain specified claims the proceeds of the sale shall be distributed ratably among the former members of the Wyandotte tribe and their heirs. There is no room to claim any breach of faith on the part of the Government.

5. It would be most impractical to regard every former member of the Wyandotte tribe as having a private interest—necessarily permanent and transmissible to his heirs—in this old cemetery, for such a construction would result not only in present and ever increasing uncertainty as to the identity of the owners of these individual interests, but through that fact would prevent the abandonment of the cemetery under any conceivable circumstances. The practical importance of this view will be readily understood upon mere reference to the fact that although in 1869, when tribal existence was resumed by most of the Wyandottes, the surviving members of that race did not exceed 200 in number (Report of Secretary of Interior for 1869, supra), in 1909 their descendants in the Indian Territory numbered 373 (Report, Commr. of Ind. Affairs for 1909, p. 185), and upon momentary consideration of the ramifications and subdivisions of the title which would grow out of mixed marriages, past and future.

IV.

The United States had the full right to administer, and in the course of such administration to alter the use or application of the Indian tribal property, during the continuance of the tribal existence. It is not to be supposed that the treaty of 1855, in making the cemetery reservation, contemplated a surrender of this power of the United States over the land after the tribe had been dissolved.

That the United States had full power to administer the tribal lands of the Indians during the tribal existence can not be disputed. This court has always recognized that fact, and in *Lone Wolf* v. *Hitchcock* (187 U. S., 553) it explicitly held "that Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress," and that "full administrative power was possessed by Congress over Indian tribal property," and that in the exercise of such power Congress was beyond the reach of the courts even though treaty obligations were claimed to be violated. Where is the provision of the treaty of 1855 in any way limiting this preexisting full administrative power?

V.

The Wyandotte tribal authorities undoubtedly had power to terminate the use of this burial ground at its pleasure. By the cession the United States would have acquired like power, even if it had not possessed it already.

It can not be disputed that the tribal authorities could have terminated the use of this land as a burial

ground at any time, despite the objections of any individual members of the tribe. The title was in the tribe and its power (except as against the United States) was supreme. It can not readily be thought that under the treaty of 1855 the United States was to have less power over the land, as successor of the tribe in its management, than the tribe itself previously possessed.

LLOYD W. BOWERS,
Solicitor-General.

BARTON CORNEAU,
Special Assistant.

JANUARY, 1910.

O

CONLEY *v.* BALLINGER, SECRETARY OF THE INTERIOR.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 77. Argued January 14, 1910.—Decided January 31, 1910.

There is no question as to the complete legislative power of the United States over the land of the Wyandotte Indians while it remained in their occupation, and parcels excepted from the general distribution under the treaty of 1855 continued under such legislative control for the benefit of the tribe.

While the United States maintains and protects Indian use of land and its occupation against others it is bound itself only by honor and not by law, and it will not be presumed to have abandoned at any time its attitude of protection towards its wards. Nor is its good faith broken by any change in disposition of property believed by Congress to be for the welfare of the Indians.

Even if a suit to enjoin disposition of property reserved by the treaty of 1855 with the Wyandottes for cemetery use is not a suit against the United States, a descendant of an Indian buried in such cemetery cannot maintain such an action to enjoin the disposition of the reserved property in accordance with an act of Congress.

In view of the circumstances of this case it is proper to dismiss the bill without costs under the provisions of the act of March 3, 1875, c. 137, § 5.

[1] Docket title originally: Lyda B. Conley, Appellant, *v.* James R. Garfield, Secretary of Interior, Appellee. January 14, 1910, on suggestion of resignation of appellee and appointment of Richard A. Ballinger, substitution of latter ordered as party appellee.

THE facts are stated in the opinion.

Lyda B. Conley, appellant, *pro se.*:

The Circuit Court in dismissing the bill for want of jurisdiction with costs erred. If it has not jurisdiction it cannot give costs. 2 Bates' Fed. Eq. Pro. 873; *Ingles* v. *Coolidge*, 2 Wheat. 363; *Hornthall* v. *Keary*, 9 Wall. 566; *Blacklock* v. *Small*, 127 U. S. 96; May's U. S. Sup. Ct. Prac. 5; *Mayor* v. *Cooper*, 6 Wall. 247.

The Circuit Court has jurisdiction to enjoin the acts of individuals who invade constitutional rights under color of an unconstitutional act of Congress. Cooley's Const. Lim., 7th ed., 28; May's Prac. 102; *Tindel* v. *Wesley*, 167 U. S. 213; Cooley's Torts, 2d ed., 830; Black's Const. Law, 131, 417; Century Digest, under Courts, § 844½; Cooley's Principles, 136, 345; Sutherland's Notes, 78, 644; *Poindexter* v. *Greenhow*, 114 U. S. 273, 297; *Camp* v. *Holt*, 115 U. S. 620; *Board of Education* v. *Blodgett*, 115 Illinois, 411; *Eaton* v. *Railroad Co.*, 51 N. H. 504; Ordronaux on Legislation, 254; *Murray* v. *Hoboken Land Co.*, 18 How. 277; *Lowe* v. *Kansas*, 163 U. S. 85; *Lascre* v. *Rochereau*, 17 Wall. 438; *Orchard* v. *Alexander*, 157 U. S. 373; *State* v. *Tulow*, 129 Missouri, 163; Works' Courts & Jurisdiction; 1 Desty's Fed. Procedure, 9th ed., 42; *Leeper* v. *Texas*, 139 U. S. 462; *Union Trust Co.* v. *Stearns*, 119 Fed. Rep. 794.

The Circuit Court erred in holding that it did not have jurisdiction because only rights of persons and property and not political rights are subjects of judicial power. Judicial power covers every legislative act of Congress whether within or beyond its legislative power. *Ableman* v. *Booth*, 21 How. 506, 520; *Fifth Nat. Bank* v. *Long*, 7 Biss. 502; *Elliott* v. *Van Vorst*, 3 Wall., Jr., 299; *Cunningham* v. *Macon &c. R. R.*, 109 U. S. 446, 451; *Union Trust Co.* v. *Stearns*, 119 Fed. Rep. 793; Field's Fed. Courts, 113; *Osborn* v. *Bank*, 9 Wheat. 738; *Poindexter* v. *Greenhow*, 114 U. S. 291; *Smyth* v. *Ames*, 169 U. S. 518; Webster's Citizenship, 47; *Blair* v. *Silver Peak Mines*, 93 Fed. Rep. 335; Sutherland's Notes, defining citizenship, 569

and 610; *United States* v. *Cruikshank*, 92 U. S. 542; Story's Comm., § 1693; Cooley's Principles, 31, 163, 269, 367; 27 Century Digest, 150; Ordronaux, 478; Kansas Bill of Rights, Art. I, § 1; *Rison* v. *Farr*, 24 Arkansas, 168; Wells' Jurisdiction of Courts, 3; Cooley's Const. Lim., 7th ed., 131; Potter's Dwarris, 65, 351; Brown's Leg. Max. 34.

Treaty stipulations are subjects of judicial cognizance, and Congress cannot annul titles under treaties by subsequent legislation repealing the treaty. Sutherland's Notes, 484; *Chirac* v. *Chirac*, 2 Wheat. 277; *Reichart* v. *Felps*, 6 Wall. 166; *Wilson* v. *Wall*, 6 Wall. 83; Brown on Jurisdiction, 2d ed., 6, 86; Black's Const. Law, 50.

The question of jurisdiction does not depend on truth or falsity of the charge but upon the nature of it, and is determinable at the commencement and not at the conclusion of the inquiry. Brown's Constitutional Inquiries, 65; *Dartmouth College Case*, 4 Wheat. 519.

The judiciary is the only department of the Government to construe a treaty or statute. 1 Butler's Treaty Power, 145; *Society* v. *New Haven*, 8 Wheat. 464; 4 Fed. Stat. Ann. 281, and cases cited under Rev. Stat., § 629.

The Circuit Court had jurisdiction because this case arises under the Constitution and laws of the United States and the chancery court has jurisdiction of cases of charitable uses independent of the statute of 43 Elizabeth. Chap. 4; Tiedeman, Real Property, 906; Carter's Jurisdiction of Fed. Courts, 8; 1 Desty's Fed. Proc., 9th ed. 365; *Osborne* v. *Bank*, 9 Wheat. 818, 870; *Marbury* v. *Madison*, 1 Cranch, 137; Cooley's Principles, 31, 126; *Ableman* v. *Booth*, 21 How. 519; Black's Const. Law, 118; *Tennessee* v. *Davis*, 100 U. S. 257; Cooley's Const. Lim. 29; *Sawyer* v. *Concordia*, 12 Fed. Rep. 754; 1 Kent, 14th ed., 322; *United States* v. *Arredondo*, 6 Pet. 691, 738; Works on Jurisdiction, 430; *West. Un. Tel. Co.* v. *Andrews*, 154 Fed. Rep. 95; *Matter of Young*, 209 U. S. 123, 144; Sutherland's Notes, 481; 13 Century Digest, 540, cases under "Treaties"; 9 Fed. Stat. Ann. 34; *Head Money Cases*, 112 U. S. 598; 1 Bouvier's

Law Dict. 311; Ordronaux, 627; 2 Story's Eq. Jurisdiction, 12th ed., §§ 1171*a*, 1177; *Good* v. *McPherson*, 51 Missouri, 126; 2 Pingrey on Real Property, 1083; 2 Beach on Injunction, 1154; *Cincinnati* v. *White*, 6 Pet. 431; *Hunter* v. *Sandy Hill*, 6 Hill, 407; *Beatty* v. *Kurtz*, 2 Pet. 585; 1 Foster's Fed. Prac., 3d ed., 452; 13 Century Digest, §§ 797, 844; Black's Const. Prohibitions, 20.

Appellant shows by the cases cited that this case is not one against the United States; that the act of Congress involved interferes with her vested rights to her irreparable injury without due process of law and is not a proper exercise of legislative power under the Fifth Amendment to the Constitution; that Congress cannot interfere with vested rights under treaties and has no power to nullify titles confirmed many years before by the Government's authorized agents and that charitable uses are protected by the courts as required by equity and good conscience, and the court has jurisdiction to and should award the relief prayed for.

The Solicitor General and *Mr. Barton Corneau* for appellees, submitted:

The lower court was without jurisdiction as $2,000 was not involved and the act of February 6, 1901, 31 Stat. 760, authorizing suits by Indian allottees does not apply—and furthermore the suit is one really against the United States. *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Louisiana* v. *Garfield*, 211 U. S. 70.

It was not the purpose of the Treaty of 1855 in reserving this land as a public burying ground to create in appellant or other members of the former Wyandotte Tribe individual rights, legal or equitable, in the land. The United States took the land free at any rate from more than a mere moral obligation, which the act of June 21, 1906, amply meets. *Fleming* v. *McCurtain*, 215 U. S. 56.

The United States had the full right to administer, and in

the course of such administration to alter the use or application of the Indian tribal property, during the continuance of the tribal existence. It is not to be supposed that the Treaty of 1855, in making the cemetery reservation, contemplated a surrender of this power of the United States over the land after the tribe had been dissolved. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The Wyandotte tribal authorities undoubtedly had power to terminate the use of this burial ground at its pleasure. By the cession the United States would have acquired like power, even if it had not possessed it already.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity to enjoin the Secretary of the Interior and Commissioners appointed by him from selling or disturbing an Indian cemetery. The bill was demurred to on the grounds, among others, that the matter in dispute was not alleged to exceed the value of two thousand dollars, and that the suit was a suit against the United States. The bill was dismissed for want of jurisdiction and an appeal was taken to this court.

The substance of the bill is as follows: The plaintiff is a citizen of the State of Kansas and of the United States and a descendant of Wyandotte Indians dealt with in the Treaty of January 31, 1855. 10 Stat. 1159. By Article 1 of that treaty the tribe of the Wyandottes was to be dissolved on the ratification of the treaty and the members made citizens of the United States, with exemption for a limited time of such as should apply for it. By Article 2 the Wyandotte Nation ceded their land to the United States for subdivision in severalty to the members, "except as follows, viz., The portion now enclosed and used as a public burying ground, shall be permanently reserved and appropriated for that purpose;" &c. The plaintiff's parents and sister are buried in this ground, and she alleges that she "has seizin, and a legal estate and vested

rights in and to" the same, and that although the land is worth $75,000, there is no standard by which to estimate the value of her rights. (It is set forth further that by a treaty of February 23, 1867, with the Senecas and others, Art. 13, 15 Stat. 513, 516, a portion of the Wyandottes were allowed to begin anew a tribal existence; but the bearing of this treaty upon the case does not appear.) The defendants are intending and threatening to remove the remains of persons buried as above to another designated place and to sell the burying ground; the proceeds after certain deductions to be paid to parties to the Treaty of 1855, or their representatives, in accordance with the Act of Congress of June 21, 1906, c. 3504, 34 Stat. 325, 348. This act is alleged to violate the constitutional rights of the plaintiff and to be void.

The record shows that the court left it open to the plaintiff to amend so as to avoid any technical objection that could be avoided by amendment, and as she conducted her own case, we go as far as we can in leaving such considerations on one side. For every reason we have examined the facts with anxiety to give full weight to any argument by which the plaintiff's pious wishes might be carried out. But if it is obvious that the bill could not be amended so as to state a case within the jurisdiction of the court, the judgment must be affirmed or the appeal dismissed, as the defect of jurisdiction turns out to be peculiar to courts of the United States as such, or one common to all courts.

The allegation of the plaintiff's interest plainly does not mean that she has taken possession of the whole burying ground and has acquired a seizin of the whole by wrong. As it does not mean that, it must mean simply a statement of the rights that the plaintiff conceives to have been conferred by the Treaty of 1855 upon those whom she represents. The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent

appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.

But we do not pursue the attempt to state the argument on that side because we are of opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so. The Government cannot be supposed to have abandoned merely for a moment and for a secondary matter its general attitude toward the Indians as wards over whom and whose property it retained unusual powers, so long as they remained set apart from the body of the people. The very Treaty of 1867, cited in the bill, providing for the resumption of the tribal mode of life by the Wyandottes, shows that the United States assumed still to possess such unusual powers. It seems to us that the reasonable interpretation of the language as to the burying ground is not that the United States declares itself subject to a trust which no court could enforce against it, if against any one, (see *Naganab* v. *Hitchcock*, 202

U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60,) while on the other hand it stripped itself of any protecting power that otherwise it might have retained. It seems to us more reasonable to suppose that the words 'shall be permanently reserved and appropriated for that purpose,' like the rest of the treaty, were addressed only to the tribe and rested for their fulfilment on the good faith of the United States—a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians.

We are driven to the conclusion that even if the suit is not to be regarded as a suit against the United States within the authority of the cases cited, 202 U. S. 60 and 473, the United States retained the same power that it would have had if the Wyandotte Tribe had continued in existence after the treaty of 1855, that the only rights in and over the cemetery were tribal rights, and that the plaintiff cannot establish a legal or equitable title of the value of $2,000, or indeed any right to have the cemetery remain undisturbed by the United States.

We are of opinion that in view of the circumstances it is just that the bill should be dismissed without costs. Act of March 3, 1875, c. 137, § 5, 18 Stat. 472.

Decree reversed. Bill dismissed without costs.